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Ontario Commission
Human Rights ontarienne des
Commission droits de la personne

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HUMAN RIGHTS POLICY

IN ONTARIO



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HUMAN RIGHTS POLICY IN ONTARIO

ONTARIO HUMAN RIGHTS COMMISSION

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TABLE OF CONTENTS

Preface	6
Preface to the Third Edition	
Preface to the Second Edition	
Preface to the First Edition	
 Part I — Policies and Guidelines	15
Policy on Creed and the Accommodation of Religious Observances	17
Policy on Discrimination and Harassment because of Gender Identity	37
Policy on Discrimination and Harassment because of Sexual Orientation	53
Policy on Discrimination and Language	73
Policy on Discrimination because of Pregnancy	83
Policy on Drug and Alcohol Testing	103
Policy on Employment-Related Medical Information	117
Policy on Female Genital Mutilation (FGM)	121
Policy on Height and Weight Requirements	141
Policy on HIV/AIDS-Related Discrimination	147
Policy on Racial Slurs and Harassment and Racial Jokes	157
Policy on Requiring a Driver's License as a Condition of Employment	167
Policy on Scholarships and Awards	171
Policy on Sexual Harassment and Inappropriate Gender-Related Comments and Conduct	179
Policy and Guidelines on Disability and the Duty to Accommodate	197
Guidelines on Special Programs	241
Developing Procedures to Resolve Human Rights Complaints within your Organization	251
 Part II — Ontario <i>Human Rights Code</i> & Regulations	263
Ontario <i>Human Rights Code</i>	264

Regulation 642 (Search and Entry Warrants)	296
Regulation 290/98 (Business Practices Permissible to Landlords in Selecting Prospective Tenants for Residential Accommodation)	299
Part III — Index	301
Part IV — Other OHRC Publications	313
Part V — For Further Information	315
How to Reach Us	318

Preface

Preface to the Third Edition

I am pleased to present the third edition of *Human Rights Policy in Ontario*. We have, over the last three years, found this publication to be of growing relevance to the work that we do in the Commission, as well as to the growing number of human rights advocates, human resources professionals and community workers who require an up-to-date, sophisticated research and reference tool.

Notably, this edition contains the Commission's new *Policy and Guidelines on Disability and the Duty to Accommodate*. This replaces the influential 1989 *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*. This new Policy builds on the positive work that was done in 1989, while incorporating critical thinking from academics, the Supreme Court of Canada, other courts and human rights tribunals and labour adjudicators across the country. It also creates an important framework for addressing disability rights by establishing inclusive standards to ensure that persons with disabilities are vital participants in community life and have equal access to work-related opportunities. Like all of the Commission's policies, the new Policy sets out how the Commission will deal with complaints based on disability.

Other work in this new edition includes:

- the updated *Policy on Drug and Alcohol Testing*;
- the new *Policy on Discrimination and Harassment because of Sexual Orientation*;
- the updated *Policy on Discrimination because of Pregnancy*, which reflects the rights of new mothers to breastfeed their babies without discrimination in the workplace and in public places; and
- the *Policy on Discrimination and Harassment because of Gender Identity*, which highlights the need for society to recognize the rights of transgendered persons.

This edition is especially significant for us because it is the result of a partnership between the Ontario Human Rights Commission and CCH Canadian Ltd., one of Canada's largest and most respected information providers for human resource, legal and accounting professionals. We are honoured that this work has been selected to be part of a major publishing initiative in Canada on human rights.

This publication is intended to assist everyone in creating an environment where human rights are respected and promoted. It continues to be an indispensable tool for all human rights practitioners.

KEITH C. NORTON, Q.C., BA, LL.B.

Chief Commissioner

June 2001

Preface to the Second Edition

I am pleased to introduce this second edition of *Human Rights Policy in Ontario*, a revised collection of policies and guidelines approved by the Ontario Human Rights Commission.

Last year at this time, the Commission published its first compendium of new policy work to commemorate the 50th anniversary of the United Nations' Universal Declaration of Human Rights. High demand and depleted supply indicated a clear need to continue this work.

Making Policy a Priority

The Commission has two broad areas of responsibility under the *Human Rights Code*. The first relates to case management. The second is set out in section 29 of the *Code* and includes the responsibility to:

- forward human rights policy;
- promote understanding, acceptance and compliance with the *Code*;
- provide public information, education and research designed to eliminate discrimination;
- examine and review statutes, regulations, programs and policies which may be inconsistent with the *Code*; and
- encourage public and private organizations to undertake programs to alleviate discrimination.

In order to carry out its mandate effectively and meaningfully, the Commission periodically reviews the *Code* to ensure that its interpretation reflects court decisions and emerging social realities and that it is able to protect persons who are vulnerable. The capacity to identify issues and to speak out is an important part of the Commission's legal mandate to promote awareness of and respect for human rights. One important mechanism through which the Commission expresses its views is through policy work of the kind found in this book.

Commission policies and guidelines are approved statements setting out the Commission's interpretation of specific provisions of the *Code*. They are important because the public has the right to expect that the Commission will deal with cases in a way that is consistent with its published policies. These documents provide detailed, referenced information to the general public, practitioners, advocates and human resources professional service

providers and contain up-to-date references to key decisions of boards of inquiry as well as significant decisions outside of Ontario.

The Commission's vision of responsible independence depends for its success on three things. First is its capacity to speak out independently and to ensure that approved policy statements support its case management work. Second is the willingness of the Commission, the legislature and civil society to work together to achieve a culture of human rights. Third, we all work in a broader community of international law that sets legal and customary standards used by Canadian courts. In appropriate cases, therefore, the Commission uses international standards, such as the *International Convention on the Elimination of all Forms of Racial Discrimination* and the *Convention on the Elimination of all Forms of Discrimination against Women*, and other conventions that Canada has ratified, to form its interpretation of the Code. The importance of this third factor is reinforced at the international level through UN resolutions supported by Canada, which ensure the independence of human rights commissions to develop public policy and promote public awareness.

This book has emerged over the last several years as part of the Commission's commitment to fulfil these important functions. Our policy work also ensures that the public has clear and comprehensive information, interpretive guidelines and research sources about human rights in this province. The Commission's policies, guidelines and plain language documents together form the most significant contribution of policy work by any human rights commission in the country. And, with new work under way in the areas of gender identity, insurance and social condition, Ontario has truly become a "cutting edge" jurisdiction for human rights and public policy development.

KEITH C. NORTON, Q.C., BA, LL.B.

Chief Commissioner

December, 1999

Preface to the First Edition

WHEREAS recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[] *Preamble, Universal Declaration of Human Rights (1948).*

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations[] *Preamble, Ontario Human Rights Code, Chapter H.19*

This year, we join with human rights commissions in Canada and around the world, with nations and non-governmental organizations to celebrate the 50th anniversary of the Universal Declaration of Human Rights (UDHR). The 1948 Declaration has significance not only because of its compelling universality, but also because of the human rights conventions, covenants and other instruments that give legal force to its standards.

As well as setting global benchmarks at the international level, these standards are of critical importance to human rights law at the national level. In Canada, domestic human rights law finds its most important expression in the Charter of Rights and Freedoms and, of course, in human rights acts and codes at both the federal and provincial levels. Although the relationship between the Charter and international human rights law is clearly established both in the historical record and in case law, a similar relationship with anti-discrimination laws, such as human rights codes, is difficult to discern in decisions of tribunals and the courts.

This is unfortunate for a number of reasons. It robs decision-makers of valuable information about how to interpret human rights laws. It ignores the fact that the UDHR was an inspiration for the Code itself, and it isolates human rights codes from their intellectual and legal heritage. Most important, as a signatory to several international conventions in human rights, Canada has an obligation, at both levels of jurisdictional competence, to comply with these conventions and to meet the standards set out in them. One important mechanism for compliance is the enactment of human rights law and its enforcement by arm's-length agencies such as human rights commissions.

The Ontario *Human Rights Code*, the oldest human rights code in the country, owes an historical debt to the UDHR in both its preamble and in several of its central concepts. As the 50th anniversary of the UDHR approached, it became clear that a special initiative was needed to cement

the important relationship between the work of the Commission and the legacy of the UDHR. This publication is a centrepiece of the Commission's initiative, to commemorate both an historic occasion and the substantive achievements in human rights law that have been inspired by it.

Nowhere is the inspiration more important than in the area of policy. The Commission has the responsibility to advocate and promote human rights in both policy and practice. This gives the Commission opportunities to provide leadership in policy development and to act as an agent of positive change. It also provides an opportunity to integrate international principles of human rights law in our daily work.

Through the efforts of the Commission before boards of inquiry and in policy development, the *Code* has been afforded a broad, liberal and purposive interpretation in order to provide protection in cases where the law was unclear. These efforts provided a legal basis and an impetus for policy changes in Ontario and ultimately for legislative change in some cases.

For this reason, public policy statements and guidelines are the most important documents used by the Commission other than the *Code* itself. They provide information about the Commission's interpretation of specific provisions of the *Code*, and the public has the right to expect that the Commission will adhere to the principles espoused in its policy statements.

Beginning in 1996, the Public Policy and Public Education Branch of the Ontario Human Rights Commission began a comprehensive review of its entire policy framework in order to ensure that staff and the general public have up-to-date information about the *Code* and the Commission's policy decisions. It also brings human rights policy work into line with recent case law and other legal and social developments, and to introduce international standards into the fabric of human rights law as it is interpreted in Ontario. The review has now been substantially completed, with over twenty new or revised policy documents, guidelines and plain-language documents having been developed, approved by the Commission and released to the public.

Plain-language documents are designed for anyone seeking general knowledge about basic concepts in the *Code*, or seeking guidance about how to apply human rights law in the workplace or elsewhere. Policy documents, on the other hand, reflect not only updates required by changes to the *Code* but also revisions that reflect recent developments in significant decisions of boards of inquiry. They have been written for an audience who already has basic knowledge of the *Code* and human rights law, and is seeking additional information, details or supporting references.

The new policy work contains several innovative features:

- reference to applicable international conventions that are relevant to the subject matter in the policy are reproduced in each document *i.e.*, the *Code*, *Employment Standards Act*, etc., for ease of reference.
- key Board of Inquiry decisions and court decisions are cited and references are integrated into the text of the policy statements.
- Commission policies are now available on the Commission Web Site for easy access, in addition to the alternative formats that continue to be available.

Part I of this publication focuses on new policy work that is informed by international standards. The Commission's policy on Female Genital Mutilation, for example, was introduced to respond to specific provisions under the Convention on the Rights of the Child that prohibit traditional practices which are harmful to girl children. In other documents, international standards are incorporated directly into Commission policies that deal with rights that are explicitly protected under the *Code*. For example, the Convention on Elimination of Discrimination Against Women sets out equality rights and rights of pregnant and lactating women, as well as related rights in the post-natal period. This standard is now being used in the Commission's policy on pregnancy.

Similarly, the 1993 World Conference on Human Rights (the Vienna Declaration) stated that gender-based violence and sexual harassment are incompatible with the dignity and worth of human beings. These principles have long been established under the *Code*, but their affirmation at the international level brings a new dimension to policy development in this field.

The Vienna Declaration also highlights the important role of human rights commissions in promoting awareness of human rights generally and of human rights remedies in particular. Part II of this publication thus reflects an educational approach to human rights education and includes new guidelines and other information documents that are of practical use in learning how to access the Commission's services, or how to develop procedures and practices that comply with human rights law.

Finally, it should be noted that this publication includes only new policy work at the Commission and therefore does not purport to be comprehensive. Information about other Commission publications may be obtained in the

appendix, by contacting the Commission directly, or by accessing our Web site at <http://www.ohrc.on.ca>.

December, 1998

PART I — POLICIES AND GUIDELINES

Note:

The information contained in this publication is available from the Commission in various formats: IBM compatible disk, audio tape, large print. Telephone 1-800-387-9080, TTY 1-800-308-5561, or e-mail info@ohrc.on.ca.

This information is also available on Internet: <http://www.ohrc.on.ca>

All policies included in this document reflect the Commission's interpretation of the Ontario *Human Rights Code* provisions and should be read in conjunction with the specific provisions of the Ontario *Human Rights Code*. Any questions regarding this policy should be directed to the staff of the Ontario Human Rights Commission.

POLICY ON CREED AND THE ACCOMMODATION OF RELIGIOUS OBSERVANCES

Approved by the Commission: October 20, 1996

POLICY ON CREED AND THE ACCOMMODATION OF RELIGIOUS OBSERVANCES

The Ontario *Human Rights Code* (the “*Code*”), states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Creed is a prohibited ground of discrimination under the *Code*. Every person has the right to equal treatment with respect to services, goods, facilities, employment, the occupancy of accommodation, the right to enter into contracts and the right to join trade unions or other vocational associations, without discrimination because of creed.

These policy guidelines set out the position of the Ontario Human Rights Commission with respect to creed and the accommodation of religious observances related to a person's creed.

1. Application of This Policy

The *Human Rights Code* applies to:

- (i) the workplace (including recruiting, application forms, interviews, promotions, office dress codes and shift schedules);
- (ii) services, goods and facilities (schools, school boards, shops, restaurants, hospitals, correctional facilities and insurance services);
- (iii) the occupancy of accommodation (including rental accommodation such as apartments, college residences, hotel/motel facilities and condominium housing);
- (iv) contracts (verbal or written agreements); and
- (v) membership in occupational associations and trade unions.

2. Definition of Creed¹

Creed is not a defined term in the *Code*. The Ontario Human Rights Commission has adopted the following definition of creed:

Creed is interpreted to mean “religious creed” or “religion”. It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.

Religion is broadly accepted by the Commission to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as *bona fide* newer religions (assessed on a case-by-case basis).

The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

“Creed” is defined subjectively. The *Code* protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed,² provided they are sincerely held.

It is the Commission’s position that every person has the right to be free from discriminatory or harassing behaviour that is based on religion or which arises because the person who is the target of the behaviour does not share the same faith. This principle extends to situations where the person who is the target of such behaviour has no religious beliefs whatsoever, including atheists and agnostics who may, in these circumstances, benefit from the protection set out in the *Code*.³

In either situation, creed must be involved — either because the person who is the subject of the discrimination is seeking to practice his or her own religion, or because the person who is harassing or discriminating is trying to impose their creed on someone else. In both cases, creed must be involved.

Creed does not include secular, moral or ethical beliefs or political convictions.⁴ This policy does not extend to religions that incite hatred or violence against other individuals or groups,⁵ or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law.⁶

3. Equal Treatment on the Ground of Creed

Freedom of religion is the basic principle that informs the right to equal treatment under the *Code* on the ground of creed.⁷ First, this implies that the law can require measures to facilitate the practice of religious observances.⁸

Second, it also means that no person can force another to accept or comply with religious beliefs or practices.

This dual aspect of equality is emphasized by case law that has consistently protected freedom of religion and expressions of religious beliefs as well as non-beliefs and refusals to participate in religious practices.⁹ According to a 1989 board of inquiry, no matter how convinced a person may be that he or she has a religious message that others should hear and heed, the *Code* prohibits the imposition of that message onto others. "In the workplace, a religiously militant employer is no more entitled to impose his or her version of religious enlightenment on employees than a sexually militant employer is entitled to impose his or her sexual ideas or wishes."¹⁰

4. Discrimination

4.1 Discrimination and Harassment

In *Dufour v. J. Roger Deschamps Comptable Agréé*, the Ontario Board of Inquiry stated that:

[h]arassment or discrimination against someone because of religion is a severe affront to that person's dignity, and a denial of the equal respect that is essential to a liberal democratic society.¹¹

Discrimination because of creed includes any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect the nullification or impairment of the recognition of human rights and fundamental freedoms on an equal basis.¹²

Harassment on the grounds of creed is a form of discrimination. It involves conduct or comments concerning religious beliefs or practices which are known or ought to be known to be offensive. A single incident may constitute "harassment" and may create a poisoned environment if it is substantial or significant enough.

Example: Management makes an employee's religious practices or beliefs the subject of jokes or derogatory comments by other employees. This conduct is a form of harassment and the employee has the right to complain to the Commission.

4.2 Direct and Indirect Discrimination

Discriminatory practices that fail to meet any statutory justification test¹³ are illegal and will be struck down.

Example: Unless the client-employer is a "special interest organization,"¹⁴ an employment agency that screens out all persons who do

not share the employer-client's religion is acting illegally. Such practices cannot be justified on the grounds of customer preference.¹⁵

Example: A public school that gives priority to the Lord's Prayer as part of opening and closing exercises fails to treat non-Christians equally.¹⁶

Discrimination can also be indirect.

Example: A landlord prefers renting to tenants whose religion is the same as the landlord's. If a tenant refuses to sublet the apartment based on the landlord's "rule," then the landlord may also be named as a respondent to a human rights complaint.¹⁷

4.3 Constructive Discrimination

Constructive discrimination arises when a neutral requirement, qualification or factor has an adverse impact on members of a group of persons who are identified by a prohibited ground of discrimination under the *Code*. Because of its adverse impact, this is said to result in "constructive discrimination." Section 11(1) of the *Code* provides that discrimination occurs:

Where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.

Unless an exception is provided by law, constructive discrimination cannot be tolerated unless the employer takes reasonable steps to accommodate the affected person. A *prima facie* case of constructive discrimination is established if it can be shown that an individual has been subject to an exclusion, restriction or preference that has had an adverse impact on members of a group protected by the *Code*.

Typically, in the context of creed, issues arise in the areas of:

- (i) dress codes
- (ii) break policies
- (iii) recruitment and job applications
- (iv) flexible scheduling
- (v) rescheduling
- (vi) religious leave

We will deal each of these special cases in Part 7.

4.4 Needs of the Group

The term “needs of the group” means the needs of the religious group to which an individual belongs. The group’s needs must be assessed in order to accommodate the individual.¹⁸ Courts have looked to the accepted religious practices and observances that are part of a given religion or creed in order to assess those needs.

Example: School teachers of the Jewish faith request a paid day of leave in order to observe Yom Kippur. In order to assess the needs of the group, the employer should seek information about the tenets of the Jewish faith, which establish that observant Jews cannot work on Yom Kippur.¹⁹

5. The Duty to Accommodate

The *Code* provides the right to be free from discrimination, and there is a general corresponding duty to protect the right: the “duty to accommodate.” The duty arises when a person’s religious beliefs conflict with a requirement, qualification or practice. The *Code* imposes a duty to accommodate based on the needs of the group of which the person making the request is a member. Accommodation may modify a rule or make an exception to all or part of it for the person requesting accommodation.

Section 11(2) of the *Code* imposes the duty to accommodate in cases of constructive discrimination:

11(2). The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

5.1 Rights and Duties

Both the people responsible for providing the accommodation and the person requesting it have rights and responsibilities during accommodation. We list some of these below by way of example:

Person Requesting Accomodation	Person or Organization Responsible for Providing Accomodation
Take the initiative to request accom- modation	Respect the dignity of the person seeking accommodation
Explain why accommodation is required	Assess the need for accommodation based on the needs of the group of which the person is a member. ²⁰
Provide notice of request in writing, and allow a reasonable time for reply	Reply to the request within a reason- able time
Explain what measures of accom- modation are required	Grant requests related to the obser- vance of religious practices
Deal in good faith	Deal in good faith
Be flexible and realistic	Consider alternatives
The individual may request details of the cost of accommodation if undue hardship may be a factor	If accommodation is not possible because of undue hardship, explain this clearly to the person concerned and be prepared to demonstrate why this is so.

Sometimes, it may not be possible completely to resolve the conflict without causing undue hardship to the person responsible for providing the accommodation. A measure of accommodation may be acceptable if it meets the needs of the person, to the greatest extent possible, short of undue hardship, and if it respects the dignity of the person requiring the accommo-
dation.

5.2 Unions and the Duty to Accommodate

In the case of discrimination in the workplace, both management and the union have a duty to accommodate. In *Central Okanagan School District No. 23 v. Renaud*²¹ the Court noted that although the principle of equal liability applies, the employer has charge of the workplace and will be in a better position to formulate measures of accommodation. The employer, therefore, can be expected to initiate the process of taking measures to accommodate an employee. Nevertheless, the Court also noted that they will not absolve a union of its duty if it fails to put forward alternative measures that

are available. In short, when a union is a co-discriminator with an employer it shares the obligation to remove or alleviate the source of the discriminatory effect.²²

Example: Mr. Renaud, a school custodian, complained that the school board and the union had failed to agree on how to modify Mr. Renaud's shift hours. As a Seventh Day Adventist, he was unable to work Friday afternoons. It was decided that the union, together with the employer, had a duty to accommodate Mr. Renaud, short of undue hardship. Mr. Justice Sopinka wrote that the union may be liable in two situations:

... first, [the union] may cause or contribute to the discrimination by participating in the formulation of the work rule that has a discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement; second, a union may be liable if it impedes the reasonable efforts of an employer to accommodate.²³

In *Gohm v. Domtar*²⁴ the employer agreed to accommodate Mrs. Gohm by rescheduling her to work Sunday instead of Saturday, if she would not receive premium pay as provided by the collective agreement. The employer's attempt was blocked by the union. In finding that the union had discriminated against the complainant, the Ontario Divisional Court set out the concept of "equal partnership":

Discrimination in the workplace is everybody's business. There can be no hierarchy of responsibility ... companies, unions and persons are all in a primary and equal position in a single line of defence against all types of discrimination. To conclude otherwise would fail to afford to the *Human Rights Code* the broad purposive intent that is mandated. Any interpretation short of this would ... be inconsistent with the philosophy and policy enunciated by the Supreme Court of Canada in *O'Malley v. Simpson-Sears*.²⁵

6. The Standard of "Undue Hardship"

The duty to accommodate is limited to those steps that may be required to accommodate, short of undue hardship. The burden of proving undue hardship lies with the person responsible for providing the accommodation. Each option should be examined to decide whether undue hardship will result. In determining whether or not an accommodation measure creates undue hardship, the following factors should be considered.

Cost: This includes the actual, present financial cost of carrying out an accommodation measure, as well as any reasonably foreseeable costs which may arise. The cost to the person responsible for providing the accommodation may include operational costs that may be significant enough to constitute undue hardship.

Outside Sources of Funding: An employer can demonstrate that the costs of accommodation will cause undue hardship. However, the availability of outside sources of funding that may alleviate any accommodation costs must first be considered. Undue hardship will exist if the financial costs are such that they would alter the essential nature, or substantially affect the viability, of the employer's business.

Health and Safety Risks: Health and safety risks to the person requesting the accommodation, as well as to other employees and/or the general public, are to be taken into consideration.

The assessment of these factors should be undertaken having regard to the size of the organization and its operations, the nature of its business, and its financial capabilities. In no circumstances should discriminatory customer preferences or those of co-workers be considered valid factors when evaluating whether or not an accommodation measure will create undue hardship.

Undue hardship is a relative concept. Accommodation may cause undue hardship to one employer but not to another. It is also possible that a method of accommodation which does not cause undue hardship to an employer now may cause undue hardship in the future. This may happen as circumstances change; for example, the number of employees requesting accommodation may increase significantly. Therefore, it is important to take into consideration all the relevant factors when attempting to determine when the standard of undue hardship is met.

7. Specific Cases

Dress codes, work schedules or shift work sometimes impact adversely on individuals because of religious requirements. When this happens, the obligation to accommodate the individual, based on the needs of the *group*, is triggered under the *Code*.

7.1 Dress Codes

Workplaces, services and facilities frequently have rules about dress. These may take the form of having to wear a particular uniform, having to wear protective gear, or a requirement that no person may wear a head covering. These rules may come into direct conflict with religious dress

requirements. When they do, there is a duty to accommodate the person, short of undue hardship.

Example: A school requires its students to wear a particular uniform which prohibits any head covering. A Muslim girl wears a head covering as part of her religious observance. The school authorities have a duty to accommodate such a student and to permit her to wear the head covering.

Example: Certain creeds do not permit men to cut their hair. Workplaces that prefer to employ men with short hair are acting in a discriminatory manner, unless they fall under a legal exception under the *Code*. It should be noted that for health and safety reasons, an employer may ask employees to contain their hair with a net or other appropriate head covering.

Example: A school principal tells the parents of a Sikh child that wearing a turban or kirpan to school is not allowed. However, the “five K’s” and related religious rules that include the wearing of a turban by Sikh men are part of the Sikh faith. In similar cases, Boards of Inquiry have rejected arguments by schools based on safety, on the grounds that wearing a ceremonial kirpan does not raise sufficiently compelling safety concerns. Schools must modify their policies to accommodate children seeking to modify the application of the rule for religious reasons.²⁶

Considerations when dealing with dress codes:

- (i) What is the exact nature of the religious observance?
- (ii) What is the reason for the uniform or dress code?
- (iii) What measures can be taken to accommodate the person? Are there alternatives?
- (iv) Are there health or safety factors involved?
- (v) If so, do they involve the health or safety of the employee alone or are there consequences for other employees?
- (vi) If so, has the employer shown that to accommodate the employee would create a health or safety hazard that would amount to undue hardship for the employer?

As a rule, uniforms such as school uniforms and work uniforms that have no health or safety rationale can be modified easily to permit the person concerned to wear the required item(s) of clothing. Clothing or gear with a health or safety rationale may constitute a reasonable occupational require-

ment. Nevertheless, the employer is obliged to accommodate the employee, for example, by seeing whether the gear can be modified to permit the person to wear the religious dress safely (subject to the undue hardship test), or by examining whether the employee can be transferred to another job that may be available in the company that does not require the clothing or gear.

7.2 Break Policies

Some religions require that their members observe periods of prayer at particular times during a day. This practice may conflict with an employer's regular work hours or daily routines in the workplace. The employer has a duty to accommodate the employee's needs, short of undue hardship.

Possible forms of accommodation:

- (i) a modified break policy;
- (ii) flexible hours; and/or
- (iii) providing a private area for devotions.

7.3 Recruitment Procedures

A job applicant's religion cannot be used as a selection criterion for employment. There is an exception if the workplace qualifies as a "special interest" organization under the *Code*, that is, one that is a religious, educational, or other social institution or organization that is primarily engaged in serving the interests of persons who are identified by their creed (section 24(1)(a) of the *Code*). Subject to this exception, attempting to obtain information concerning the applicant's creed at the pre-interview stage of a recruitment process is not acceptable.

Consequently, invitations to apply for employment and job application forms cannot contain:

- (i) questions about availability for work that are asked in a manner that reveals the applicant's creed;
- (ii) questions designed to reveal that religious requirements may conflict with the prospective employer's work schedules or workplace routines; or
- (iii) inquiries as to religious affiliation, places of worship that are attended, or customs observed.

However, nothing prevents the employer from asking questions about creed at a personal employment interview, if the questions are otherwise permitted by the *Code*. A list of questions that can and cannot be asked

during the employment application process can be found in the Commission's publication, *Hiring? A Human Rights Guide*.

Example: It is permitted at an employment interview to ask religious membership for a teaching position in a denominational school if the job involves communicating religious values to students.

If a person has been offered employment, the person has the obligation to notify the employer of any religious requirements that are relevant to the performance of his or her duties, and to request accommodation.

7.4 Religious Leave

When an employee requests time off to observe a holy day, the employer has an obligation to accommodate the employee. The extent of the accommodation required is an issue that comes up frequently: Does the person have to be paid? Until what point? What about unpaid leave?

Two Christian holidays (Christmas Day and Good Friday) are also statutory holidays in Ontario. This is sometimes held up as evidence of the “non-discriminatory” nature of these holidays. Some employers have argued that because these holidays are now statutory, the employer has no obligation to accommodate employees by paying for other religious holidays. The Supreme Court of Canada has stated that this approach is incorrect.

In *Chambly*²⁷, the Court examined the issue of whether the “secularized” nature of Good Friday and Christmas can excuse a policy alleged to be discriminatory based on religion because it is based on the Christian calendar. The Court wrote:

Here the schedule of work is based upon the Catholic calendar of holidays. Nonetheless, I think the calendar should be taken to be secular in nature and thus neutral or non-discriminatory on its face. It will be remembered that the majority of the Court of Appeal determined that since the calendar did not have any religious aims, it was not discriminatory. With respect, I think this was an erroneous conclusion. It is true that this approach can properly serve to determine that there has been no direct discrimination. However, the analysis cannot stop there. Consideration must still be given to the *effect* of the calendar in order to determine if there is indirect or adverse effect discrimination.²⁸ [Emphasis in original.]

In other words, the secularized nature of traditional Christian holidays may remove the taint of direct discrimination but not of constructive discrimination.

Example: In *Chambly*, three Jewish teachers employed by a Catholic school board were denied access to the special-purpose paid-leave provisions in the collective agreement so that they could observe Yom Kippur. They were told instead that they could take the day off, but unpaid. The Court held that the school board's leave policy had an adverse effect on Jewish teachers despite the secularized nature of Good Friday and Christmas. The analysis which led to the Court's finding of adverse effect is set out by Mr. Justice Cory.

... Christian holy days of Christmas and Good Friday are specifically provided for in the calendar. Yet, members of the Jewish religion must take a day off work in order to celebrate Yom Kippur. It thus inevitably follows that the effect of the calendar is different for Jewish teachers ... [t]hey ... must take a day off work while the majority of their colleagues have their religious holy days recognized as holidays from work. In the absence of some accommodation by their employer the Jewish teachers must lose a day's pay to observe their holy day. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious beliefs. The calendar or work schedule is thus discriminatory in its effect.²⁹

The Court then examined the nature of the accommodation which would be required to alleviate the adverse effect. It rejected the view that the school board's offer of unpaid leave to the Jewish teachers was sufficient accommodation. Mr. Justice Cory wrote:

If a condition of work existed which denied all Asian teachers one day's pay, it would amount to direct discrimination ... The loss of one day's pay resulting from direct discrimination would not be tolerated ... and would fly in the face of human rights legislation. Similarly adverse effect discrimination resulting in the same loss cannot be tolerated *unless the employer takes reasonable steps to accommodate the affected employees*.³⁰ [Emphasis added.]

The Court concluded religious leave should have been available under the special-purpose paid-leave provision in the collective agreement. This did not cause undue hardship to the school board.

A number of general principles emerge from this case that are not limited in their application to the particular terms of the collective agreement examined in *Chambly*.

- (i) The employer has a duty to consider and grant requests for religious leave, including paid religious leave, unless to do so will cause undue hardship.

- (ii) Equality of treatment requires at a minimum that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday).
- (iii) The number of paid days may be three under some collective agreements which also make Easter Monday a holiday.
- (iv) Beyond this point, *i.e.*, two or three days, individuals may still seek accommodation. For example, measures might include additional paid leave days such as floating days or compassionate leave days, if such exist under company policy or collective agreements, or through unpaid leave.
- (v) The standard for *all* accommodation requests is undue hardship, which places a specific burden on the employer to produce evidence to the standard of undueness of the hardship and of its effect.

7.5 Flexible Scheduling

The purpose of this measure is to allow a flexible work schedule for employees, or to allow for substitution or rescheduling of days when an employee's religious beliefs do not permit him or her to work certain hours. For example, Seventh Day Adventists and members of the Jewish faith observe a Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times.

Flexible scheduling may include alternative arrival and departure times on the days when the person cannot work for the entire period, or use of lunch times in exchange for early departure or staggered work hours. Where the person has already used up paid holy days to which he or she is entitled, the employer should also consider permitting the employee to make up time lost or use floating days off.

7.6 Rescheduling and the *Employment Standards Act*

In some workplaces, rescheduling is a practicable accommodation measure but it poses a financial difficulty because of the requirement of paying wages at a premium rate, typically at one and a half times the regular rate, to individuals who work on Good Friday and Christmas. In Ontario, the *Employment Standards Act*, R.S.O. 1990, E-14 provides that:

- s. 26(1) ... where an employee works on a public holiday³¹, the employer shall pay to the employee for each hour worked a premium rate of not less than one and one-half times the employee's regular

rate and, where the employee is entitled to the holiday with pay, his or her regular wages in addition thereto.

The requirement of premium pay for work done on public holidays may present a financial obstacle to accommodation in that it may constitute undue hardship. However, section 25(3) of the *Employment Standards Act* allows for another alternative, namely the substitution of public holidays:

s. 25(3) ... where a public holiday falls upon a working day for an employee, an employer may with the agreement of the employee or the employee's agent substitute another working day for the public holiday which day shall not be later than the next annual vacation of the employee, and the day so substituted shall be deemed to be the public holiday.

If a person seeks accommodation and if section 25(3) of the *Employment Standards Act* presents an alternative, rescheduling would constitute an acceptable form of accommodation.

Since the employer and the union have a joint legal obligation to accommodate employees as established in *Renaud*³² and other cases, the employer and the union should be free to enter into agreements that are more generous than the minimum standards set by the *Employment Standards Act*, according to section 4 of that Act:

section 4 ... right, benefit, term or condition of employment under a contract ... that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.

8. Exceptions

Discrimination or unequal treatment may be legally defensible in certain circumstances.

8.1 Participating in Special Interest Organizations

First, section 18 of the *Code* provides that religious, philanthropic, educational, fraternal or social institutions which are primarily engaged in serving the interests of persons who are identified by their creed, may give priority to persons of the same creed with regard to participation or membership.

8.2 Employment in Special Interest Organizations

Second, section 24(1)(a) of the *Code* provides that religious, philanthropic, educational, fraternal or social institutions that are primarily engaged in

serving the interests of persons identified by their creed may employ or give preference in employment to persons similarly identified, if the qualification is reasonable and in good faith in relation to the nature of the employment.

Example: An educational institution such as a denominational school may prefer to employ teachers of the same denomination or faith. This hiring policy would be permitted if the teacher's own faith is related to the professional functions that teachers are expected to perform in denominational schools. However, this same defence is not available to the school with respect to the hiring of maintenance staff. The school must show that the requirement of belonging to a particular faith has a rational connection to the essential duties of a job.

8.3 Reasonable and *Bona Fide* Occupational Requirements, Qualifications or Factors

If a requirement, qualification or factor is neutral or nondiscriminatory on its face, it may nonetheless have an adverse impact effect and may be discriminatory under section 11 of the *Code*. However, the *Code* provides a defence if the requirement, qualification or factor is *reasonable and in good faith*, and if the needs of the persons affected cannot be accommodated without undue hardship to the person responsible for accommodating those needs.

Example: A policy that requires all employees to work on a day which coincides with the holy day of a particular creed may be defensible, despite its adverse impact on some employees, because the nature of the business is such that a certain day of the week is critical to the operations of the establishment. However, the employer has a duty to accommodate an employee, if this can be accomplished short of undue hardship to the employer. Administrative inconvenience does not constitute undue hardship.

- (i) The requirement in question must be established in good faith with the intention of achieving its stated business objective, and not as a means to avoid the purpose of the *Code*.
- (ii) The requirement must be objectively connected to its stated business purpose.
- (iii) The requirement should be the least discriminatory alternative available, other things being equal.

9. Conclusion

Religious pluralism poses a challenge in any multicultural society, especially one as diverse as ours. Although the law is developing rapidly in this area, an informed spirit of tolerance and compromise is indispensable to any civil society, as well as to its capacity to make opportunities available to everyone, on equal terms, regardless of creed.

ENDNOTES

- ¹ Human rights laws in other Canadian jurisdictions use terms such as "religion" as prohibited grounds of discrimination. For a review of decisions dealing with "creed" and "religion," see Tamopolsky, *Discrimination and the Law* (Toronto: Richard deBoo, 1985) at 6-1 to 6-6.
- ² See *Singh v. Workmen's Compensation Board Hospital & Rehabilitation Centre* (1981), 2 C.H.R.R. D/549 (Ont. Bd. of Inquiry); *Bhinder v. Canadian National Railway Co.* (1981), 2 C.H.R.R. D/546 (Cdn. Human Rights Tribunal), reversed [1983] 2 F.C. 531, affirmed [1985] 2 S.C.R. 561.
- ³ Atheists deny the existence of God; agnostics are of the view that nothing is known or likely to be known about the existence of God.
- ⁴ But see *Obdeyn v. Walbar Machine Products of Canada Ltd.* (1982), 3 C.H.R.R. D/712 (Ont. Bd. of Inquiry) at D/716-D/717.
- ⁵ Not only are such groups not protected under the *Code*, but they may also be subject to provisions of the *Criminal Code*. Any reports of activities involving such groups should be immediately reported to the police.
- ⁶ For example, female genital mutilation is a violation of women's human rights and is not protected on the ground of creed. See the Commission's *Policy on Female Genital Mutilation*.
- ⁷ This is reflected in the Preamble of the *Code* which recognizes that the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace . . . [and that has as its aim] the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.
- ⁸ The notion of "accommodation" is dealt with in the section entitled "Duty to Accommodate".
- ⁹ The principle was established in the Charter context in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 (S.C.C.) at par. 24775.
- ¹⁰ *Dufour v. J. Roger Deschamps Comptable Agréé* (1989), 10 C.H.R.R. D/6153 (Ont. Bd. of Inquiry) at 6170.
- ¹¹ *Ibid.*
- ¹² See the *International Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981).
- ¹³ S. 24(1)(a) of the *Code*, for example, allows an institution which primarily serves the interests of an identifiable religious group to prefer job applicants who are also members of that group.
- ¹⁴ *Ibid.*
- ¹⁵ S. 23(4) of the *Code*.
- ¹⁶ See *Opening and Closing Exercises for Public Schools in Ontario* (Ministry of Education and Training, 1993). See also *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (Ont. C.A.).
- ¹⁷ S. 9 of the *Code* deals with indirect discrimination.
- ¹⁸ S. 11(2) of the *Code*.
- ¹⁹ *Commission scolaire régionale de Chambly v. Bergevin* (1994), 22 C.H.R.R. D/1 (S.C.C.).

- ²⁰ S. 11 of the *Code*. Individuals may seek accommodation for religious practices or observances that do not conform to established dogma, or they may seek to observe a practice which is not shared by all members of the creed. Dress codes, dietary laws, *etc.* are good examples of religious practices that are sincerely observed but may not be followed by all practitioners of a creed.
- ²¹ *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425, Supreme Court of Canada. The British Columbia *Human Rights Act* which was in force at the time did not mention the duty to accommodate explicitly. The principle reached by the Supreme Court of Canada in *Renaud*, namely, that the union as well as the employer has a duty to accommodate short of undue hardship, applies *a fortiori* to the Ontario *Human Rights Code* which explicitly imposes a duty to accommodate, short of undue hardship.
- ²² *Ibid.* at D/438.
- ²³ *Supra*, note 21 at D/436–D/437.
- ²⁴ (1982), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).
- ²⁵ *Ibid.* at 312.
- ²⁶ *Sehdev v. Bayview Glen Junior Schools Ltd.* (1988), 9 C.H.R.R. D/4881 (Ont. Bd. of Inquiry); *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364, *aff'd* (1991), 14 C.H.R.R. D/403 (Ont. Div. Ct.), leave to Ont. C.A. refused.
- ²⁷ *Commission scolaire régionale de Chambly v. Bergevin* (1994) 22 C.H.R.R. D/1 (S.C.C.).
- ²⁸ *Ibid.* at D/11.
- ²⁹ *Ibid.* at D/11–D/12.
- ³⁰ *Ibid.* at D/12.
- ³¹ “Public holiday” is defined in s. 1 of the ESA as including “New Year’s Day, Christmas Day and the 26th day of December”.
- ³² *Supra*, note 21.

POLICY ON DISCRIMINATION AND HARASSMENT BECAUSE OF GENDER IDENTITY

Approved by the Commission: March 30, 2000

POLICY ON DISCRIMINATION AND HARASSMENT BECAUSE OF GENDER IDENTITY

1. Introduction

The *Human Rights Code*¹ (the “*Code*”) states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

The Ontario Human Rights Commission (the “Commission”) has developed policy statements and guidelines that cover many human rights issues. However, issues related to gender identity remain largely unresolved in policy, procedures, and law.

Gender identity is not an enumerated ground in the *Code*. However, the existing legal structure in the *Code* can support a progressive understanding of the ground of “sex” to include “gender identity” and protect individuals who are subject to discrimination or harassment because of gender identity. This approach toward the application of the *Code* has been accepted for some time and is well demonstrated by Mr. Justice McIntyre who said:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the *Code* than the narrowest interpretation of the words employed. *The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . . and give to it an interpretation which will advance its broad purposes* . Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary...². [Emphasis added.]

The right to equal treatment without discrimination or harassment because of sex extends to all persons. The Commission has taken the policy position that this protection extends to persons because of gender identity.

However, this policy focuses on persons whose gender identity diverges from their birth-assigned identity.

Complaints related to gender identity are made almost exclusively by transgenderists and transsexuals. There are, arguably, few groups in our society today who are as disadvantaged and disenfranchised as transgenderists and transsexuals.³ Fear and hatred of transgenderists and transsexuals combined with hostility toward their very existence are fundamental human rights issues. As the organization responsible for the administration and enforcement of the *Code*, the Commission is in a unique position to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination because of gender identity. Mr. Justice Sopinka once noted:

Human rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a “special nature, not quite constitutional but certainly more than the ordinary. . .” (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547). *One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised.*⁴ [Emphasis added].

2. Purpose of the Policy

This policy sets out the position of the Commission with respect to gender identity and is intended to help the public understand how the *Code* protects against discrimination and harassment because of gender identity and to assist employers and providers of services and accommodation to understand their responsibilities under the *Code*. The policy also can be used for educational initiatives such as the development of training materials and the revision of anti-discrimination and harassment policies so that they include gender identity.

By developing this policy the Commission is:

- promoting the dignity and equality of those whose gender identity does not conform to traditional social norms;
- ensuring that all people are protected by the *Code*;
- promoting awareness of gender identity and preventing discrimination and harassment; and
- dispelling stereotypes and myths that foster discrimination and harassment against individuals because of their gender identity.

3. Background

Over the last two decades, there has been a growing awareness of people whose gender identity is different from their birth-assigned genders and from social norms of “male” and “female”. These people may include pre- and post-operative transsexuals, transgenderists, intersexed people, cross-dressers and others.⁵ Along with the emerging visibility of these individuals is a growing appreciation and understanding of the problems that they face in their daily lives. There are numerous community organizations, newspapers, magazines and websites dedicated to gender identity issues that have chronicled these problems which include employment discrimination, harassment, denial of services, violence, high suicide rates, substance abuse and poverty.

This increased awareness of gender identity led the British Columbia Human Rights Commission to propose including “gender identity” as a formal ground for protection in their human rights law.⁶ However, at this time, this proposal has not been adopted. Other jurisdictions are moving toward recognition of gender identity as a protected ground in their laws. Australian discrimination laws as well as several American municipalities and states recognize transgendered people and have included the ground of gender identity or similar concepts in their human rights laws.⁷

In 1998, the Commission developed a discussion paper on gender identity. The discussion paper was based on research, community consultations and interviews with selected officials and health professionals. The paper canvassed jurisprudence, domestic and international legislation, literature, and other human rights organizations’ policies. The discussion paper *Toward a Commission Policy on Gender Identity* was publicly released in October 1999.⁸ This policy is based on the work done to date and reflects the Commission’s formal position on gender identity.

4. What is “Gender Identity”?

Gender identity is linked to an individual’s intrinsic sense of self, particularly the sense of being male or female. Gender identity may or may not conform to a person’s birth-assigned sex. The personal characteristics that are associated with gender identity include self-image, physical and biological appearance, expression, behaviour and conduct, as they relate to gender.

At birth, a child is assigned a gender by a health care professional based on observation of the child’s genitalia. Society makes the assumption that based on this medical assessment a child will grow up to exhibit correspondingly masculine or feminine behaviours and appearances. However, this is not always the case. A person’s felt identity or core identity may differ in part or in

whole from their birth-assigned sex.⁹ Individuals whose birth-assigned sex does not conform to their gender identity include transsexuals, transgenderists, intersexed persons and cross-dressers.

A person's gender identity is fundamentally different from and not determinative of their sexual orientation.

5. Application of this Policy

Based on a purposive and liberal interpretation of the ground of sex, it is the Commission's position that the protection of the *Code* extends to all individuals who are denied equal treatment because of gender identity. The Commission will accept complaints related to gender identity on the ground of sex where it is the person's gender identity that is the reason for the discrimination. The Commission deals with complaints on a case-by-case basis regardless of which grounds are identified.

This policy applies to:

- (i) the workplace (including recruiting, application forms, interviews, promotions, and access to and receipt of employee benefits);
- (ii) services, goods and facilities (private businesses, municipal governments, shops, restaurants, hospitals, correctional facilities, insurance services, *etc.*);
- (iii) the occupancy of accommodation (including rental accommodation such as apartments, college residences, hotel/motel facilities, condominium housing, as well as commercial premises);
- (iv) contracts (verbal or written agreements); and
- (v) membership in vocational associations and trade unions.

6. Discrimination

Every person has the right to equal treatment without discrimination because of sex, which includes gender identity. Discrimination because of gender identity includes distinctions such as exclusions, restrictions or preferences based on gender identity, or those that result in the impairment of the recognition of human rights and fundamental freedoms on an equal basis. In *Andrews v. Law Society of British Columbia*,¹⁰ Mr. Justice McIntyre defined discrimination as:

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds

or limits access to opportunity, benefits, and advantages available to other members of society.¹¹

6.1 Direct Discrimination

A person discriminates directly when he or she treats another person unequally or differently because of his or her gender identity.

Example: An employee advised her employer that she was taking time off work to undergo sex-reassignment surgery. The employer granted the employee the time off but when the employee returned to work after the surgery, she was terminated. In this case, the tribunal considered the meaning of the protected ground of sex contained in section 10 of Québec's *Charter of Human Rights and Freedoms* and concluded that sex does not include just the state of a person but also the very process of transformation that is part of transsexualism.¹²

6.2 Indirect Discrimination

Discrimination can also be indirect and may occur when one person causes another to act on his or her behalf and to discriminate against a person because of his or her gender identity.

Example: A landlord advises the superintendent that she does not want any apartments rented to transsexuals. A person who is a transsexual responds to an advertisement for the apartment and is advised by the superintendent that there are no units available, even though there are units available. The landlord may also be named as a respondent in a human rights complaint because the landlord indirectly discriminated by requiring the superintendent to follow a discriminatory instruction.

6.3 Constructive Discrimination

Constructive discrimination arises when a neutral requirement, qualification or factor has an adverse impact on members of a group of persons who are identified by a prohibited ground of discrimination under the *Code*. Constructive discrimination results from this adverse impact. Section 11(1) of the *Code* provides that constructive discrimination occurs:

Where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a

prohibited ground of discrimination and of whom the person is a member.

In such a case, the person responsible for the discrimination must establish if the rule is reasonable and *bona fide* and then take steps to accommodate the affected person to the point of undue hardship.

Example: A nightclub patron who is a pre-operative male to female transsexual was denied access to the women's washroom even though she was presenting herself as a woman. The nightclub's policy on the use of washrooms was that transsexuals were not permitted to use the women's washroom. She filed a human rights complaint and the tribunal found that while this policy was neutral, it had an adverse effect on transsexuals. The tribunal concluded its decision, which was in the complainant's favour, by stating that discrimination against a transsexual constitutes discrimination because of sex.¹³

Example: The *Vital Statistics Act*¹⁴ requires that all birth certificates in the province identify individuals as male or female. This requirement is neutral on its face since it requires all people to be identified as male or female. However, for an individual whose gender identity does not conform to the designation on his or her birth certificate, this may have an adverse impact. The person who shows this identification or relies on it to obtain a permit or official document may be refused because the service provider observes an inconsistency between the way the person presents him/herself and the designation on the birth certificate.

6.4 Discrimination Because of Association

Persons who are subject to discrimination because of their association with a person protected under the *Code* may file a complaint based on section 12, which protects against discrimination because of association.

Example: A female tenant of an apartment asks for maintenance on her unit. This request is denied because the superintendent says he does not like her friend who is a cross-dresser. Although the tenant was not subjected to discrimination because of her own gender identity, she was subjected to discrimination because of her relationship with a person who is a cross-dresser.

7. Employment

Section 5(1) of the *Code* provides that every person has a right to equal treatment in employment without discrimination because of sex, which includes gender identity. Denying or restricting employment opportunities in hiring, training, promotion, transfers, etc. because of gender identity is a violation of the *Code*. This is based on the notion that individuals who are the targets of the discriminatory behaviour are being judged on stereotypes about how men and women should behave and look and not on the basis of merit.

Example: A woman working on a temporary basis is offered a full-time position as a customer-service associate by her supervisor on the condition that she wear dresses and change her hairstyle to a more feminine one. The employer believes this is necessary because the customers will not like the woman's overly masculine appearance.

Example: An employee discloses to his manager that he cross-dresses. The manager subsequently tells the employee that he will no longer qualify for promotions or further career training because customers and co-workers will be uncomfortable with him.

8. Services

Section 1 of the *Code* provides that every person has a right to equal treatment with respect to services, goods, and facilities, without discrimination because of sex, which includes gender identity. This includes refusal of a service or other differential treatment.

Example: A transsexual woman volunteered as a librarian at a community organization for lesbians and also became a member of the organization. In an article that appeared in a community newspaper, she identified herself as a lesbian but not a woman. Two board members of the organization disapproved of her remarks in the newspaper article. The woman subsequently received a letter advising that her services as a librarian were no longer required and that she was no longer welcome in the organization. The woman filed a human rights complaint, and while the tribunal did not find that the individual was an employee of the organization, they did find that she was discriminated against in the provision of a service because of sex.¹⁵

Example: A municipality that provides the service of issuing proclamations must do so in a non-discriminatory manner. A transgender

support group asks for a proclamation for “Transgender Pride Week” and the Mayor and City Council reject the request. The basis for the refusal is that the Mayor and City Council morally oppose the goals and activities of the group, while they routinely approve proclamations from other groups whom they support.¹⁶

Example: A restaurant owner who refuses service to a customer who is a transsexual and throws her out of the restaurant infringes the person's right to receive a service without discrimination.¹⁷

9. Accommodation (Housing)

Section 2(1) of the *Code* provides that every person has a right to equal treatment with respect to the occupancy of accommodation (housing) without discrimination because of sex, which includes gender identity.

Example: A student responds to an advertisement for a house that is for rent and arranges to view the house and meet with the owner. A few days later, she contacts the owner and advises him that she wishes to rent the house. At the second meeting with the owner of the house, he asks her if she is really a woman and proceeds to tell her that he does not rent to transvestites.

10. Membership in Vocational Associations

Section 6 of the *Code* provides that every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of sex, which includes gender identity.

Example: A transsexual employee was involved in a dispute with her employer. The individual did not feel that her union's actions on her behalf regarding this dispute were adequate. She alleged that the union discriminated against her in its response to the incident, both initially and with respect to the events that followed the initial dispute, and in the way it responded to the employer's handling of the complaint made against her. The tribunal found that the union had treated her worse than it would have treated other union members in similar circumstances and that her status as a transsexual was a factor in her treatment. The tribunal ordered the union to cease its contravention of the human rights law and to pay her damages for lost wages and the injury it had done to her dignity, feelings and self-respect.¹⁸

11. Harassment

Harassment because of gender identity is covered by the *Code* under the ground of sex.

11.1 Definition of Harassment

Harassment is defined in subsection 10(1) of the *Code* as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”. This definition guides the Commission in determining what forms of behaviour are inappropriate under the *Code*.

The reference to comment or conduct that is known or ought reasonably to be known to be unwelcome establishes an objective test for harassment:

- (i) In some situations, it should be obvious that the conduct or comments will be offensive or unwelcome.
- (ii) Since the individual may be in a vulnerable situation, there is no requirement that the individual object to the behaviour in order for there to be a violation of the *Code*. It may be unrealistic to require an individual who is the target of harassment to object to the offensive treatment as a condition of being able to claim a right to be free from such treatment.
- (iii) Conduct or comments which relate to a person’s gender identity may not, on their face, be offensive. However, they may still be unwelcome from the perspective of the particular individual. If the individual objects and if similar behaviour is repeated, it may constitute a violation of the *Code*.

Each situation that is brought to the attention of the Commission through a human rights complaint will be assessed on its own merits. However, transphobic epithets, comments ridiculing individuals because of their gender identity, or singling out an individual for humiliating or demeaning teasing or jokes related to, or because of, gender identity may be conduct which ought reasonably to be known to be unwelcome.

Examples of situations that might be considered harassment include the following:

- (i) A landlord says to a tenant, who is a member of a cross-dresser organization, “I don’t know why you people don’t go live with your own kind, because you sure don’t belong here.”
- (ii) Demeaning sexual remarks, jokes or innuendo about an employee, client or customer, or tenant told to others might deny the right of

those persons who are the subject of the comments to be viewed as equals.

- (iii) Demeaning comments, signs, caricatures, or cartoons displayed in a service environment such as a store, restaurant, or in a workplace or rental apartment building may create a poisoned environment in violation of the *Code*.
- (iv) The display of transphobic, derogatory or offensive pictures, graffiti or materials is humiliating and also impairs the right of those persons who are members of the targeted group to be viewed as equals. An employer, service provider or landlord who tolerates inappropriate pictures, graffiti or materials and does not take any steps to remove them may create a poisoned environment. Depending on the particular circumstances, some persons may be humiliated or may experience feelings of hurt, anger and resentment because of their gender identity.

11.2 Comments or Conduct Need Not be Explicit

Comments or conduct do not need to be explicit to infringe a person's right to equal treatment without discrimination or harassment. Where a person is singled out and treated differently because of gender identity, even where the differential treatment does not include explicit reference to gender identity, there may still be a violation of the *Code*.

Example: In a warehouse, a transgendered female employee is repeatedly made the brunt of practical jokes and called a “freak” by her co-workers.

11.3 Poisoned Environment

A single instance of harassment because of gender identity may not fall within the definition of harassment under the *Code*. However, there could be circumstances in which a single incident of inappropriate behaviour may be significant or substantial enough to constitute a breach of the *Code* by creating a poisoned environment for individuals because of their gender identity. In other words, there could be circumstances in which unequal treatment does not have to occur continually or repeatedly in order for a violation of the *Code* to occur.

A consequence of creating a poisoned environment is that certain individuals are subjected to terms and conditions of employment, tenancy, services, etc. that are quite different from those experienced by individuals who are not subjected to these comments or conduct. In such instances, the right

to equal treatment may be violated. Demeaning remarks, jokes or innuendo based on gender identity not only poison the environment for transgenderists and transsexuals but affect everyone's environment.

The conduct at issue must be objectively evaluated. It must be of such a nature and degree so as to amount to a denial of equality through the creation of a poisoned environment.

12. Confidentiality of Information

Gender identity is a personal characteristic that may or may not be known to others. While most people are not concerned about others knowing their gender identity, this may not be the case for transsexuals and transgenderists. Despite the protections set out in the *Code*, individuals who identify or are identified as transsexual or transgendered face the very real possibility of being subjected to overt or subtle discrimination and/or harassment. This can be particularly detrimental in the workplace.

An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies a person's sex which may be different from his or her gender identity must ensure the maximum degree of privacy and confidentiality of the information. This applies in all situations and circumstances, including employment records and files, insurance company records, medical information, etc. The information might be required to enable an employee or individual to claim or register for benefits, to apply for an apartment, or other purposes. All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system in order to protect the individual's confidentiality.

Confidential information that might be collected includes:

- birth certificate;
- driver's licence;
- identification of next of kin;
- identification of beneficiary for insurance purposes; and
- a claim for health benefits.

An employer or service provider who fails to properly safeguard personal information about an individual's sex or gender identity may infringe the *Code*. A complaint could be made where this results in a person being subject to discrimination and/or harassment because of his or her gender identity.

13 Liability of Employers for the Actions of Their Employees/Agents

13.1 Common Law: The Organic Theory of Corporate Responsibility

Generally, an employer is not liable for acts of harassment carried out by its employees unless it can be proven that it was aware of the harassment. The corporation may also be held responsible for the actions of that employee if it can be shown the employee was part of the management or “directing mind” of the organization. In such cases, the decisions and acts of the employee are so closely identified with the employer that they are treated as one and the same. In other words, the acts or omissions of supervisors, managers, etc. are considered to be the acts of the employer, giving rise to corporate responsibility.

13.2 Vicarious Liability

Under section 45 of the *Code*, a corporation, union, trade or occupational association will be held responsible for discrimination committed by employees or agents as though the corporation, union, trade or occupational association had committed the breaches itself. This is known as vicarious liability. The corporation, union, etc. is vicariously liable for the acts of its employees or agents. The doctrine of vicarious liability does not apply to harassment as defined in subsection 10(1)(f) of the *Code*. Rather, it applies to breaches of the equality rights provisions of the *Code*.

14. Glossary

This glossary was developed based on the Commission's research for this policy and for the discussion paper, *Toward a Commission Policy on Gender Identity*. The glossary is intended to provide general information on the terminology related to gender identity and is not intended to be an exhaustive or authoritative guide on the subject.

- **Cross-Dresser** refers to people who dress in the clothes of the opposite sex for emotional satisfaction and psychological well-being. Cross-dresser is preferred over the term 'transvestite', which is seen as a diagnostic term associated with medical identity.
- **Gender** may be defined in various ways and could include any or all of the following categories: physical anatomy (or sex organs), secondary sex characteristics that develop at and after puberty, behaviour and conduct, the mind, and fashion choices.

- **Intersexed** means being born with the (full or partial) sex organs of both genders, or with underdeveloped or ambiguous sex organs. About 4 per cent of all births may be intersexed to some degree. This word replaces the inappropriate term “hermaphrodite”.
- **Sexual orientation** is more than simply a status that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations.
- **Sex-reassignment surgery (SRS)** is the medical procedure by which an individual is surgically altered to create the physical appearance of the opposite sex.
- **Transgendered** describes individuals who are not comfortable with, or who reject, in whole or in part, their birth-assigned gender identities. The word transgendered is generally viewed as an umbrella term that unifies people who identify as transsexual, transgenderist, intersexed, transvestite or as a cross-dresser.
- **Transgenderists** self-identify and live as the opposite gender but have decided not to undergo sex reassignment surgery.
- **Transition** is the process of changing sex, including hormones, cross-living, and surgery. A practical minimum duration for this process is about two years, but it is not unusual for it to take longer.
- **Transphobia** is the unrealistic or irrational fear and hatred of cross-dressers, transsexuals and transgenderists. Like all prejudices, it is based on negative stereotypes and misconceptions that are then used to justify and support hatred, discrimination, harassment, and violence toward people who are transgendered.
- **Transsexuals** are individuals who have a strong and persistent feeling that they are living in the wrong sex. This term is normally used to describe individuals who have undergone sex-reassignment surgery. A male transsexual has a need to live as a man and a female transsexual has a need to live as a woman.

ENDNOTES

- ¹ *Human Rights Code*, R.S.O. 1990, c. H.19, as amended.
- ² *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 at D/3105 (S.C.C.).
- ³ Referred to as "transphobia".
- ⁴ See *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.
- ⁵ A glossary containing definitions used in this policy can be found at the end of the document.
- ⁶ See B.C. Human Rights Commission, *Human Rights for the Next Millennium*, (January 1998), recommendation .
- ⁷ Two examples are the Australian province *New South Wales' Anti-Discrimination Act 1977* which prohibits discrimination *inter alia* because of transgender; and the City of Pittsburgh, Pennsylvania which covers discrimination under its *Pittsburgh Code of Ordinances, Title Six — Conduct Article V: Chapter 651 (Ord. 20-1992)* which seeks to assure equal opportunity for all persons because of "sex" among other grounds, and defines "sex" as "the gender of a person, as perceived, presumed or assumed by others, including those who are changing or have changed their gender identification". For more information see, *Toward a Commission Policy on Gender Identity, Discussion Paper*, from <http://www.ohrc.on.ca/english/Discussion/genderid.htm>.
- ⁸ *Ibid.*
- ⁹ The incident rate in relation to transsexual adults is 1 in 24,000 to 37,000 men and 1 in 103,000 to 150,000 women, according to the American Psychiatric Association. The Gender Identity Clinic at the Clark Institute of Psychiatry in Toronto uses data from the United Kingdom, Sweden, and Australia which estimates the prevalence of transsexualism at about 1 case per 50,000 adults. It is important to note that transsexualism is a subgroup and the statistical information does not include transgenderists, the inter-sexed, or cross-dressers.
- ¹⁰ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
- ¹¹ *Ibid.* at 174.
- ¹² See *M.L. and Commission des droits de la personne et des droits de la jeunesse du Québec v. Maison des jeunes*, (1998) (Trib. Qué.).
- ¹³ *Sheridan v. Sanctuary Investments Ltd. et al.*, January 8, 1999 (B.C. Human Rights Tribunal) from <http://www.bchrt.gov.bc.ca/sheridan2.htm>.
- ¹⁴ *Vital Statistics Act*, R.S.O. 1990, c. V.4.
- ¹⁵ *Mamela v. Vancouver Lesbian Connection*, September 8, 1999 (B.C. Human Rights Tribunal) from <http://www.bchrt.gov.bc.ca/mamelav.htm>.
- ¹⁶ For example, see generally *Oliver v. Hamilton (City)* (1994), 24 C.H.R.R. D/293 (Ont. Bd. of Inquiry); *Hudler v. London (City)* (1997), 31 C.H.R.R. D/500 (Ont. Bd. of Inquiry); *Hill v. Woodside* (1998), 33 C.H.R.R. D/349 (N.B. Bd. Inq.).
- ¹⁷ *Commission des droits de la personne du Québec v. Anglsberger* (1982), 3 C.H.R.R. D/892(Que. Prov. Ct.).
- ¹⁸ *Ferris v. Office and Technical Employees Union, Local 15*, October 15, 1999 (B.C. Human Rights Tribunal) from <http://www.bchrt.gov.bc.ca/ferrisv.htm>.

POLICY ON DISCRIMINATION AND HARASSMENT BECAUSE OF SEXUAL ORIENTATION

Approved by the Commission: January 11, 2000

POLICY ON DISCRIMINATION AND HARASSMENT BECAUSE OF SEXUAL ORIENTATION

1. Introduction

The *Human Rights Code*¹ (the "*Code*") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims to create a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Sexual orientation and same-sex partnership status are prohibited grounds of discrimination under the *Code*. Every person has the right to equal treatment without discrimination because of sexual orientation and same-sex partnership status with respect to services, goods, facilities, employment, the occupancy of accommodation, the right to enter into contracts and the right to join trade unions or other vocational associations.

"Sexual orientation" is not a defined term under the *Code*. However, the protection for sexual orientation extends to all persons, regardless of whether they are gay or lesbian, bisexual or heterosexual. Nevertheless, the majority of complaints the Ontario Human Rights Commission (the "Commission") receives on the ground of sexual orientation are from gays and lesbians.

This policy sets out the position of the Commission with respect to sexual orientation and same-sex partnership status and is intended to:

- help the public understand how the *Code* protects against discrimination and harassment because of sexual orientation and same-sex partnership status; and
- assist employers and providers of services and accommodation (housing) to understand their responsibilities under the *Code*.

2. Background

2.1 Ontario Human Rights Commission

In 1977, the Commission published *Life Together*.² The Commission wrote this report, in consultation with individuals and organizations from across Ontario, to identify and address the needs of the changing human rights environment in Ontario. One of the recommendations contained in the report was that “sexual orientation” should be included as a ground in the *Code*. It was not until 1986 that the Ontario legislature amended the *Code* to include protection from discrimination based on sexual orientation. Despite the addition of sexual orientation as a protected ground in the *Code*, discrimination and prejudice against gays and lesbians continue to be serious social issues.

In 1996 the Commission undertook a community consultation with more than thirty groups to review the social environment as it related to the ground of sexual orientation. Based on the information obtained through the consultation, a review of legislation and other research, Commission staff wrote the *Sexual Orientation Options Paper*.³ The Commission adopted a number of strategies based on recommendations made in the options paper that included the following:

- enhancing public education activities to include references to the ground of sexual orientation;
- seeking intervenor status before the courts in cases outside the Commission which raise major issues regarding discrimination because of sexual orientation;
- liaising with the Minister of the Attorney General to recommend legislative changes to Ontario statutes that contain definitions of common-law spouse that exclude same-sex couples;
- adopting a policy position that the *Code* protects all individuals on the ground of sexual orientation whether or not the complainant is actually gay or lesbian; and
- accelerating the processing of complaints where the complainant is HIV positive.

2.2 Case Law

While the addition of sexual orientation as a ground in 1986 was an important step, it was not a guarantee of equality and many important issues still had to be decided by both boards of inquiry and the courts. It is this body of cases that serves to enhance our knowledge and understanding of what

the right to equal treatment without discrimination because of sexual orientation means and how it applies in practical situations.

A brief review of some of these key cases is important to understand the Commission's current policy position. One of the most serious issues was related to the fact that although sexual orientation had been made a protected ground, gays and lesbians in same-sex relationships were still subject to discrimination because their relationships were not recognized by the law. This was reflected in several Ontario statutes, including the Code itself, that restricted the definition of "spouse" to opposite-sex couples.

However, while recent legislation amends the Code and other statutes to include "same-sex partnership status", it is still instructive to review related cases such as *Leshner v. Ontario*.⁴ In *Leshner* a Board of Inquiry found that the Code's opposite-sex definitions did not comply with section 15 of the Canadian Charter of Rights and Freedoms⁵ (the "Charter"). The Board of Inquiry ordered the provincial government to "read down" the opposite-sex definition of marital status in the Code and to provide equivalent survivor benefits to its gay and lesbian employees through an arrangement outside of the existing pension plan.

In 1994, Joe Oliver made a request, on behalf of an organization called the Gay and Lesbian Alliance, to the Mayor of Hamilton to proclaim "Gay and Lesbian Pride Week." The Mayor rejected this request and so Mr. Oliver filed a complaint with the Commission. The Board of Inquiry found that the Mayor's refusal to make the requested proclamation constituted discrimination based on sexual orientation in the provision of a service.⁶

Also in 1994, the Commission referred a complaint to a Board of Inquiry that dealt in part with harassment based on sexual orientation. This was an important case because the Code does not specifically provide protection against harassment because of sexual orientation. The Board of Inquiry in *Crozier*,⁷ applying principles articulated by the Supreme Court of Canada in *Janzen*,⁸ stated that harassment because of sexual orientation is also a form of discrimination based on sexual orientation and is a violation of the Code.

While the ground of sexual orientation had been included in the Code since 1986, it was not specifically a protected ground of discrimination under section 15 of the Charter. It was not until 1995 in *Egan v. Canada*⁹ that the Supreme Court unanimously found that sexual orientation was an analogous ground similar to the other grounds in section 15. In reaching the conclusion that sexual orientation was an analogous protected ground under section 15, Cory J. observed that:

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation. They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation. The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.¹⁰

In the 1996 case of *Dwyer and Simms v. Municipality of Metropolitan Toronto & Attorney General of Ontario*,¹¹ complaints were filed by a gay man and a lesbian, who challenged their exclusion from the spousal benefits provisions of their respective employers' pension benefits, insured health benefits and uninsured employment benefit plans. The Board of Inquiry relied on the *Egan*¹² decision, challenged the constitutionality of the definitions of "spouse" and "marital status" in the Code and found that the respondents had discriminated against the complainants because of their sexual orientation.

The Supreme Court in *Vriend v. Alberta*¹³ found that the Alberta government's assertion that human rights protection was being introduced incrementally did not justify the failure to include protection for lesbians and gays. The Court stated that deference to governments must not be carried too far and that there was no proportionality between the legislative goal and the infringement. The Court also concluded that the omission of protection for lesbians and gay men is not a reasonable limit within the meaning of section 1 of the *Charter*. The Court further concluded that reading sexual orientation into the offending legislation was the most appropriate remedy.

Most recently, the Commission intervened at the Supreme Court of Canada in a case known as *M. v. H.*¹⁴ The applicant "M" went to court to obtain an order of support against "H", her former same-sex partner, after their twelve-year relationship had ended. At the outset of her support motion, "M" argued that the opposite-sex definition of "spouse" in section 29 of Ontario's *Family Law Act*¹⁵ (FLA), which precluded her from making an application for support in the context of a lesbian common-law relationship, constituted a denial of the equality rights in section 15 of the *Charter*.

On May 20, 1999, the Supreme Court of Canada found that the opposite-sex definition of "spouse" in Part III of Ontario's *FLA* was unconstitutional. Writing for the majority, Cory J. stated:

The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of section 29 of the *FLA* promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.

Therefore I conclude that...the human dignity of individuals in same-sex relationships is violated by the impugned legislation. In light of this, I conclude that the definition of spouse in section 29 of the *FLA* violates s. 15(1).¹⁶

The Court found that the exclusion of same-sex couples from section 29 of the *FLA* constitutes an infringement of equality rights that cannot be justified as a reasonable limit on constitutional rights under section 1 of the *Charter*. The Court declared section 29 of the *FLA* to be of no force and effect but suspended the application of its declaration for a period of six months in order to give the government an opportunity to make the appropriate changes to the law. It is important to note the observation of Iacobucci J.:

... declaring s. 29 of the *FLA* to be of no force or effect may well affect numerous other statutes that rely upon a similar definition of the term "spouse". The legislature may wish to address the validity of these statutes in light of the unconstitutionality of s. 29 of the *FLA*. On this point, I agree with the majority of the Court of Appeal which noted that if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus, I believe the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion.¹⁷

In response to the Supreme Court's decision, the provincial government introduced Bill 5 in the Ontario Legislature on October 25, 1999. It received Royal Assent on October 28, 1999 and all relevant statutes and regulations must be in full compliance no later than March 1, 2000. The Bill amended the *Family Law Act* (the "FLA"), on November 20, 1999, so that its provisions governing support obligations now apply to same-sex partners. The FLA's provisions relating to domestic contracts and dependants' claims for damages have also been extended to same-sex partners. Bill 5 also amends a number of other statutes (including the *Human Rights Code*) so that they now apply to same-sex partners.

Bill 5 amends the *Human Rights Code* in the following two ways:

1. It strikes out the term “marital status” wherever it appears and substitutes the following terms: “marital status, same-sex partnership status.” It also adds the term “same-sex partner” to provisions that contain the term “spouse”; and
2. It adds the following definitions to Section 10(1):

“same-sex partner” means the person with whom a person of the same sex is living in a conjugal relationship outside marriage;

“same-sex partnership status” means the status of living with a person of the same sex in a conjugal relationship outside marriage.

The principle of dignity is a cornerstone of the *Code*. The preamble of the *Code* states that “it is public policy in Ontario to recognize the dignity and worth of every person”. Everyone in Ontario, including those in same-sex relationships, are entitled to have their dignity and worth recognized. This recognition should extend to the letter and the spirit of the law, as well as to policy and practice. The government amended the *Human Rights Code* to include protection for persons in same-sex relationships. Accordingly, any individual who believes that a right under the Code has been infringed because of their same-sex partnership status may file a complaint with the Commission. The new ground of same-sex partnership status applies to all relevant Ontario statutes.

3. Application of this Policy

The *Human Rights Code* applies to:

- (i) the workplace (including recruiting, application forms, interviews, promotions, and access to and receipt of employee benefits);
- (ii) services, goods and facilities (private businesses, schools, school boards, municipal governments, shops, restaurants, hospitals, correctional facilities, insurance services, etc.);
- (iii) the occupancy of accommodation (including rental accommodation such as apartments, college residences, hotel/motel facilities, condominium housing, and rental of commercial premises);
- (iv) contracts (verbal or written agreements); and
- (v) membership in vocational associations and trade unions.

4. Definition of Sexual Orientation

Sexual orientation is not a defined term in the *Code*. However, the Commission, from its research, has developed and adopted the following definition of sexual orientation:

Sexual orientation is more than simply a "status" that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations. The protection of the *Code* extends to all individuals who are denied equal treatment because of sexual orientation.

5. Discrimination

The *Code* provides that every person has the right to be treated equally without discrimination because of sexual orientation or same-sex partnership status. Discrimination because of sexual orientation or same-sex partnership status includes any distinction, including exclusions, restriction or preference based on sexual orientation or same-sex partnership status, or that results in the impairment of the recognition of human rights and fundamental freedoms. In *Andrews v. Law Society of British Columbia*,¹⁸ McIntyre J. defined discrimination as:

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunity, benefits, and advantages available to other members of society.¹⁹

5.1 Direct Discrimination

A person discriminates "directly" when he or she treats another person unequally or differently because of sexual orientation or same-sex partnership status.

Example: An employer terminates an employee because of her sexual orientation and her decision to "come out" at the workplace as a lesbian.²⁰

5.2 Indirect Discrimination

Discrimination can also be indirect and may occur when one person causes another to act on his or her behalf and to discriminate against

someone because of their sexual orientation or their same-sex partnership status.

Example: A landlord has a rule that same-sex couples must rent a two-bedroom unit in her apartment building while opposite-sex couples can rent one bedroom apartments. If a tenant refuses to sublet the apartment to a same-sex couple based on the landlord's "rule", then the landlord may also be named as a respondent to a human rights complaint, in addition to the tenant.

5.3 Constructive Discrimination

Constructive discrimination arises when a neutral requirement, qualification or factor has an adverse impact on members of a group of persons who are identified by a prohibited ground of discrimination under the *Code*. Section 11(1) of the *Code* provides that constructive discrimination occurs:

Where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.

A *prima facie* case of constructive discrimination is established if it can be shown that an individual has been subject to exclusion, restriction or preference that has had an adverse impact on members of a group protected by the *Code* of which the individual is a member. In such a case the person responsible for the discrimination must undertake steps to accommodate the affected person up to the point of undue hardship.

Example: A regulation allows spouses and common-law couples to transfer ownership of motor vehicles from one person in the relationship to the other without having to obtain a Safety Standard Certificate, which costs \$50. This regulation, while appearing neutral on its face, constructively discriminates against individuals in same-sex relationships who wish to transfer ownership because the regulation does not recognize their relationship, which means they have to obtain a Safety Standard Certificate at a cost of \$50.²¹

5.4 Discrimination because of Association

Persons who are subject to discrimination because of their association with a person protected under the *Code* may file a complaint based on s. 12, which protects against "discrimination because of association".

Example: A female tenant of an apartment makes a request for maintenance on her unit. This request is denied because the superintendent said he does not like her lesbian friend. Although the tenant was not subjected to discrimination because of her sexual orientation, she was subjected to discrimination because of her relationship or association with someone identified by a prohibited ground of discrimination.

5.5 Discrimination because of Sexual Orientation or Same-Sex Partnership Status

The right to equal treatment means that if you have been discriminated against because of sexual orientation or same-sex partnership status you are entitled to the *Code's* protection. It is the Commission's position that a person does not actually have to prove that he or she is of a particular orientation or be lesbian, gay, bisexual or heterosexual, as long as it can be shown that there was unequal treatment because of sexual orientation.

Example: Two women who are not lesbians are dancing together in a bar when the owner interrupts them and asks them to leave. This happens after one of the women overheard the owner say, "I don't want people thinking this is a lesbian bar." Even though the women are not lesbians, they can file a complaint with the Commission because they believe they were subjected to unequal treatment because of sexual orientation.

6. Harassment

Harassment because of same-sex partnership status is covered by the *Code*. However, harassment because of sexual orientation is not specifically covered in the *Code*. The Commission takes the position that complaints alleging harassment because of sexual orientation can be accepted as complaints of discrimination because of sexual orientation. This position is based on the notion that harassing behaviour can become a condition of the person's accommodation or employment and therefore would be a violation of the *Code* for the purposes of making a complaint.²²

6.1 Definition of Harassment

Harassment is defined in section 10(1) of the *Code* as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome." The definition guides the Commission in determining what forms of behaviour are inappropriate under the *Code*.

The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” establishes an objective test for harassment:

- (i) In some situations, it should be obvious that the conduct or comments will be offensive or unwelcome.
- (ii) Since the individual may be in a vulnerable situation, there is no requirement that the individual object to the behaviour in order for there to be a violation of the *Code*. It may be unrealistic to require an individual who is the target of harassment to object to the offensive treatment as a condition of being able to claim a right to be free from such treatment.
- (iii) Conduct or comments which relate to a person's sexual orientation or same-sex partnership status may not, on their face, be offensive. However, they may still be “unwelcome” from the perspective of a particular individual. If the individual objects and if similar behaviour is repeated, it may constitute a violation of the *Code*.

Each situation that may be brought to the attention of the Commission through a human rights complaint will be assessed on its own merits. However, homophobic epithets, comments ridiculing individuals because of their sexual orientation or same-sex partnership status, or singling out an individual for humiliating or demeaning “teasing” or jokes related to sexual orientation or same-sex partnership status would in most instances be viewed as conduct or comments which “ought reasonably to be known to be unwelcome.”

Examples of situations that might be considered harassment include the following:

- (i) A landlord says to a tenant, who is a member of the gay and lesbian community, “I don't know why you people don't go live with people like yourself, because you sure don't belong here”.
- (ii) Demeaning remarks, jokes or innuendo about an employee, client or customer, or tenant about the person's sexual orientation or same-sex partnership status told to other employees, tenants, clients or customers may deny the right of those persons who are the subject of the comments, to be viewed as equals.
- (iii) Demeaning comments, signs, caricatures, or cartoons displayed in a service environment such as a store, restaurant, or in a workplace or rental apartment building may create a “poisoned environment” in violation of the *Code*.

- (iv) The display of homophobic, derogatory or offensive pictures, graffiti or materials is humiliating and also impairs the right of those persons who are members of the targeted group to be viewed as equals.
- (v) Graffiti which is tolerated by a service provider, employer, or landlord who does nothing to remove it may be creating a “poisoned environment”. Depending on the particular circumstances, some persons may be humiliated or may experience feelings of hurt, anger and resentment because of their sexual orientation or same-sex partnership status, that are not experienced by others in the same setting.

6.2 Comments or Conduct Need Not be Explicit

Comments or conduct do not need to be explicit to infringe a person's right to equal treatment without discrimination or harassment. Where a person is singled out and treated differently because of sexual orientation or same-sex partnership status, even where the differential treatment does not include explicit reference to sexual orientation or same-sex partnership status, there may still be a violation of the *Code*.

Example: In a workplace, the only gay employee is repeatedly made the brunt of practical jokes and is ridiculed by his co-workers for no apparent reason. The workplace has a history of homophobic attitudes. It may be inferred from the particular circumstances that the treatment is based on sexual orientation, although the practical jokes or ridicule may not have contained any direct reference to the employee's sexual orientation.

6.3 “Poisoned Environment”

A single instance of harassment because of sexual orientation or same-sex partnership status may not fall within the definition of harassment under the *Code*. However, there could be circumstances in which a single incident of inappropriate behaviour may be significant or substantial enough to constitute a breach of the *Code* by creating a “poisoned environment” for individuals because of their sexual orientation or same-sex partnership status. In other words, there could be circumstances in which unequal treatment does not have to occur continually or repeatedly in order for there to be a violation of the *Code*.

A consequence of creating a poisoned environment is that certain individuals are subjected to terms and conditions of employment, tenancy, ser-

vices, etc. that are quite different from those experienced by individuals who are not subjected to these comments or conduct. In such instances, the right to equal treatment may have been violated. Demeaning remarks, jokes or innuendo based on sexual orientation or same-sex partnership status not only poisons the environment for gays and lesbians but also affect everyone's environment and are disruptive.

The conduct at issue must be objectively evaluated. It must be of such a nature and degree so as to amount to a denial of equality through the creation of a poisoned environment.

7. Employment

Section 5(1) of the *Code* provides that every person has a right to equal treatment in employment without discrimination because of sexual orientation and same-sex partnership status. Denying or restricting employment opportunities in hiring, training, promotion, transfers, etc. because of sexual orientation or same-sex partnership status is a violation of the *Code*.

Example: A woman, who is a lesbian, works in the same department of a company as her partner. Her supervisor offers her a full-time position on the understanding that if she accepts, her partner will be transferred to another department in the company. While the employer believes it is necessary to protect the security of the company to make the transfer, and that a similar request would be made of a heterosexual employee, it uses the opportunity to discharge the woman because she is a lesbian rather than further discuss the transfer.²³

Example: An employee discloses that he is gay to his manager. The manager subsequently tells the employee that he will no longer qualify for promotions, postings, or further career training.²⁴

7.1 Access and Entitlement to Benefits

Bill 5 amends section 25(2) of the *Code* to include same-sex partnership status. Therefore, individuals in same-sex partnerships, as defined in section 10(1) of the *Code*, are entitled to the same benefits as individuals in opposite-sex partnerships with regard to employee superannuation or pension plans, funds, or a contract of group insurance between an insurer and an employer that complies with relevant legislation and regulations.

Example: An employer must provide individuals in same-sex relationships with the same spousal benefits provided to individuals in

opposite-sex relationships under their pension benefits plan and insured health benefits plan.

Example: A pension plan must provide same-sex partners with the same employment survivor benefits that are provided to opposite-sex partners.

Example: An employer must provide equivalent survivor benefits to its gay and lesbian employees as it does to its heterosexual employees.

Example: An insurance company's refusal to pay survivor benefits to an individual whose same-sex partner dies is in violation of the *Code*.

8. Services²⁵

Section 1 of the *Code* provides that every person has a right to equal treatment with respect to services, goods, and facilities, without discrimination because of sexual orientation and same-sex partnership status.

Example: A municipality that provides the service of issuing proclamations must do so in a non-discriminatory manner. A member of a gay and lesbian community group had a request to proclaim "Pride Weekend" rejected by the Mayor and City Council because they disagreed with the goals and activities of the group. The Mayor's and City Council's refusal to make the proclamation was an infringement of the *Code*.²⁶

Example: Services that are provided to individuals who are married or in common-law relationships should also be provided to individuals in same-sex relationships. A lesbian and her partner of seven years sought to change their respective surnames to a hyphenated version of both of their surnames under the provisions of the *Change of Name Act*.²⁷ At the relevant time, the provisions were restricted to "a man and a woman" living in a conjugal relationship and the complainant's request was refused. This was found to be a violation of the *Code*'s right to equal treatment without discrimination because of sexual orientation.²⁸

Example: An individual has the right to receive or purchase a service without discrimination because of sexual orientation. A representative of a gay organization went to a printing company to have some of its business materials printed. The owner of the company,

upon discovering that the job was for a gay organization, refused to print the materials citing his religious beliefs on sexual orientation.²⁹

9. Accommodation (Housing)

Section 2(1) of the *Code* provides that every person has a right to equal treatment with respect to the occupancy of accommodation (housing) without discrimination because of sexual orientation.

Example: Two gay students respond to an advertisement for a house that is for rent and arrange to view the house and meet with the owner. A few days later, they contact the owner and advise him that they wish to rent the house. At their second meeting with the owner of the house, he asks them if they are gay and proceeds to tell them that he does not rent to gays.³⁰

10. Confidentiality of Information

An individual's sexual orientation and same-sex partnership status are personal characteristics that may or may not be known to others. While individuals who are heterosexual may not be concerned about others knowing their sexual orientation or partnership status, this may not be the case for individuals who are gay or lesbian. Despite the protections set out in the *Code*, individuals who identify themselves as, or are identified as, gay, lesbian, bisexual or being in same-sex partnerships face the very real possibility of being subjected to overt or subtle discrimination and/or harassment; this can be particularly detrimental in the workplace.

An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies an individual's sexual orientation or same-sex partnership status must ensure the maximum degree of privacy and confidentiality of the information. This applies in all situations and circumstances including employment records and files, insurance company records, medical information, *etc.* The information might be required to enable an employee or individual to claim or register for benefits, to apply for an apartment, or for other purposes. All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system, in order to protect the individual's confidentiality.

Confidential Information that might be collected could include:

- identification of next of kin;
- identification of beneficiary for insurance purposes; and
- a claim for benefits for a same-sex partner.

An employer or service provider who fails to properly safeguard personal information about an individual's sexual orientation or same-sex partnership status may infringe the *Code* and a complaint can be made where this results in a person being subjected to discrimination and/or harassment because of their sexual orientation or same-sex partnership status.

11. The Liability of Employers for the Actions of their Employees/Agents

11.1 Common Law: The “Organic Theory” of Corporate Responsibility

Generally, an employer is not liable for acts of harassment carried out by its employees, unless it can be proven that it was aware of the harassment. The corporation may also be held responsible for the actions of that employee if it can be shown that the employee was part of the management or “directing mind” of the organization. In such cases, the decisions and acts of the employee are so closely identified with the employer that they are treated as one and the same. That is, the acts or omissions of supervisors, managers, *etc.* are considered to be the acts of the employer giving rise to corporate responsibility.

11.2 Vicarious Liability

Under section 45 of the *Code*, a corporation, union, trade or occupational association will be held responsible for discrimination committed by employees or agents as though the corporation, union, trade or occupational association had committed the breaches themselves. This is known as vicarious liability. The corporation, union, *etc.* is “vicariously liable” for the acts of its employees or agents. The doctrine of vicarious liability does not apply to harassment as defined in subsection 10(1)(f) of the *Code*. Rather, it applies to breaches of the equality rights provisions of the *Code*.

Example: An employee was subjected to discriminatory rumours in the workplace related to his sexual orientation. He brought his suspicions about the nature, source and extent of the rumours to the attention of his manager. The manager failed to take appropriate steps to investigate the rumours and failed to advise senior management of the organization. The manager subsequently filed a misleading report about the employee with a third party, which led to the employee's termination. The board found the organization vicariously liable for the discriminatory gossip of employees and for the manager's failure to investigate and address the rumours, as well as for

the manager's misleading report. The board also held the organization to be directly liable for the failure to deal with the discriminatory rumours and the misleading report filed by the manager on the basis of the "organic theory of corporate liability".³¹

12. Remedies under the *Code*

The purpose of human rights legislation is not to find fault, but to eliminate discrimination and to provide redress. It is meant to be preventative and remedial, rather than punitive. A remedy to a complaint might include restoring the complainant to a position the individual would have held had the *Code* not been violated. It may consist of compensation for loss of earnings or job opportunities, or damages for mental anguish suffered as a result of the violation.

Human rights remedies also address issues of public interest. This may include requiring changes to an organization's policies, the implementation of training initiatives, the establishment of internal human rights complaint resolution mechanisms, the introduction of anti-harassment policies, a written apology, *etc.*

ENDNOTES

- ¹ *Human Rights Code*, R.S.O. 1990, c. H.19.
- ² *Life Together*, A Report on Human Rights in Ontario (Ontario Human Rights Commission, 1977).
- ³ *Sexual Orientation Strategies*, Options Paper (December 1996: Ontario Human Rights Commission, unpublished).
- ⁴ *Leshner v. Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inquiry).
- ⁵ *Constitution Act*, 1982, Part I.
- ⁶ *Oliver v. Hamilton (City)* (1994), 24 C.H.R.R. D/293 (Ont. Bd. of Inquiry).
- ⁷ *Crozier v. Asseltine* (1994), 22 C.H.R.R. D/244 (Ont. Bd. of Inquiry).
- ⁸ *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.
- ⁹ *Egan v. Canada*, [1995] 2 S.C.R. 513.
- ¹⁰ *Ibid.* at 173.
- ¹¹ Unreported decision, September 27, 1996, Ont. Bd. of Inquiry
- ¹² *Supra*, at note 9.
- ¹³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
- ¹⁴ *Attorney General of Ontario v. M. and H.*, [1999] 2 S.C.R. 3.
- ¹⁵ *Family Law Act*, R.S.O. 1990, c. F.3.
- ¹⁶ *Supra*, at note 13, at p. 73.
- ¹⁷ *Supra*, at note 13, at p. 147.
- ¹⁸ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
- ¹⁹ *Ibid.* at 174.
- ²⁰ *Waterman v. National Life Assurance Co. of Canada (No. 2)* (1993), 18 C.H.R.R. D/176 (Ont. Bd. of Inquiry).
- ²¹ *O'Neill v. Ontario Ministry of Transportation* (1994), 27 C.H.R.R. D/405 (Ont. Bd. of Inquiry).
- ²² *Supra* note 7.
- ²³ *Supra*, note 20.
- ²⁴ *Haig v. Canada* (1991), 16 C.H.R.R. D/224 (Ont. Gen. Div.).
- ²⁵ *Hudler v. London (City)* (1997), 31 C.H.H.R. D/500 (Ont. Bd. of Inquiry); see also *Hill v. Woodside* (1998), 33 C.H.R.R. D/349 (N.B. Bd. Inq.) and *Oliver v. Hamilton (City)* (1994), 24 C.H.H.R. D/293 (Ont. Bd. of Inquiry).
- ²⁶ *Hudler v. London (City)* (1997), 31 C.H.H.R. D/500 (Ont. Bd. of Inquiry); see also *Hill v. Woodside* (1998), 33 C.H.R.R. D/349 (N.B. Bd. Inq.) and *Oliver v. Hamilton (City)* (1994), 24 C.H.H.R. D/293 (Ont. Bd. of Inquiry).
- ²⁷ *Change of Name Act*, R.S.O. 1990 c. C.7.

²⁸ *Bewley v. Ontario* (1997), 31 C.H.R.R. D/218 (Ont. Bd. of Inquiry).

²⁹ *Brillinger v. Brockie* (1999), Ont. Bd. of Inquiry Decision 99-012, unreported.

³⁰ *Quebec c. Martin* (1997), 33 C.H.R.R. D/487 (Trib. Qué.).

³¹ *Moffatt v. Kinark Child and Family Services*, (1999), Ont. Bd. of Inquiry. Decision No. 99-0015-R, unreported.

POLICY ON DISCRIMINATION AND LANGUAGE

Approved by the Commission: June 19, 1996

POLICY ON DISCRIMINATION AND LANGUAGE

1. Introduction

The Ontario *Human Rights Code* (the “*Code*”), states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

This policy statement sets out the Ontario Human Rights Commission's (the “Commission”) position on language-based discrimination in the areas of employment, accommodation, services, contracts, and membership in unions.

The *Code*, like most other provincial human rights legislation in Canada, does not include “language” as a prohibited ground of discrimination.¹ For the Commission to have jurisdiction, the discriminatory action or behaviour must be in relation to a prohibited ground of discrimination in the *Code*.

Although the *Code* does not explicitly identify “language” as a prohibited ground of discrimination, the Commission does accept complaints under a number of related grounds, such as ancestry, ethnic origin, place of origin and, in some circumstances, race.² In the Commission's experience, language can be an element of a complaint based on any of these grounds.³

2. Language-Related Grounds of Discrimination: Ancestry, Ethnic Origin, Place of Origin, Race

The first language we learn is frequently the language spoken by our parents or guardians and others who take care of us as children. There is almost inevitably a link between the language we speak or the accent with which we speak a particular language on the one hand, and our ancestry, ethnic origin or place of origin, on the other.⁴

A person's accent is also often associated with her or his “mother tongue” or place of origin. Because a person's accent is usually related to her

or his ancestry, ethnic origin or place of origin, the *Code* can be infringed when someone is denied employment, service, housing, or is otherwise discriminated against because of an accent. In these kinds of situations, the underlying discrimination is often actually based on ancestry, place of origin and, or ethnic origin.

Example: After an interview for a job as a school bus driver, a woman from Quebec, whose first language is French, was told she would not be hired for the position because she does not speak English fluently. She believed that she did have adequate command of English, but that she was turned down because her first language is French. Fluency in English was not identified as an essential feature of the job. Since one's "mother tongue" is closely associated with ancestry,⁵ to deny a person employment because she is French-speaking could constitute a violation of the *Code* on the ground of "ancestry". Also, as she is from Quebec, "place of origin" could be cited as a secondary ground in the complaint.⁶

Example: A teacher, originally from Poland, was on a school board's substitute teacher's list from which individuals are selected for short-term assignments. A period of time went by when he was not selected from this list for temporary assignments. The teacher learned that a note had been attached to his file which said that he did not speak English. The teacher filed a human rights complaint, and at a hearing before a board of inquiry, the respondent indicated that the note should have stated that the complainant spoke English with an "accent" and therefore should not be assigned to substitute for teachers in English or Social Studies classes. The board of inquiry ruled that the teacher was discriminated against because of his accent, which is directly related to his ancestry or place of origin.⁷

There can also be situations in which the issue of fluency in a language or a person's accent in speaking a particular language, can be used to mask discrimination based on race.

Example: An African-Canadian woman grew up in North Africa, speaking Italian. She had also studied in Italy. She applied for a position as a social worker with a community organization. The job description stated that, in addition to the technical skills and experience as a social worker that would be required for the job, competence in speaking "Italian, Portuguese or Chinese would be an asset". Although she was the best-qualified applicant, she was denied the position because the agency felt that its client group

would not be able to relate to “how” she spoke Italian, that is, her accent. She felt that her race was the real reason she was not hired and subsequently filed a complaint with the Commission. Her complaint was investigated and referred to a board of inquiry.

3. Harassment and “Poisoned Environment”

3.1 Harassment

Harassment is defined in Section 10(1) of the *Code* as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”.⁸ Harassment because of language or accent, may be a form of discrimination on the grounds of ancestry, ethnic origin, place of origin or in some situations race, contrary to the *Code*.

Example: A manager supervises a group of workers whose first language is Arabic. He gets angry when they speak among themselves in Arabic during their breaks. The manager orders these employees to speak “Canadian” while they are at work, and threatens to terminate their employment if they continue speaking Arabic. Unless the manager can demonstrate that speaking English at all times at the workplace is a reasonable and *bona fide* requirement in the circumstances, his behaviour could constitute harassment under s. 5 of the *Code*.

3.2 “Poisoned Environment”

There are situations in which a single incident may be significant or substantial enough to constitute a breach of the *Code* by creating a “poisoned environment” for some individuals. Unequal treatment, in the form of offensive behaviour, does not have to occur continuously or repeatedly for there to be a violation of the *Code*.

Sections 1, 2, 3, 5, 6 and 9 of the *Code* provide protection from discrimination because of race, ancestry, place of origin or ethnic origin. Any one of these sections can be the basis for a claim that a single incident was substantial enough to create a “poisoned environment”.

In determining whether a “poisoned environment” has been created for persons identified by a prohibited ground of discrimination, the Commission looks at the impact of the behaviour rather than the number of times the behaviour occurs. A “poisoned environment” can arise when a person or a group of people are treated differently for reasons related to the language they

speak. Language is often a pretext for indirectly discriminating against someone because of her or his ancestry, place of origin or ethnic origin.⁹

Example: A law professor tells his class that those who speak English with a “foreign” accent do not make “good lawyers”, and should not be admitted to law schools in Ontario to occupy spaces that should be held by Canadians. This remark in itself may be sufficient to poison the environment for those students in the class whose first language is not English, or those whose first language may be English but come from a country other than Canada and speak English with an accent. It may also have an impact on students whose ancestors came from, for example, Asia or Africa, because the comment targets new Canadians, many of whom now immigrate from these regions of the world.

4. Constructive Discrimination

Under section 11 of the *Code*, constructive discrimination may occur where there is a requirement, qualification or factor that is not discriminatory on its face, but when applied, results in the exclusion, restriction or preference of a group of persons identified by a prohibited ground of discrimination in the *Code*.¹⁰

Section 11(1)(a) further provides that a requirement, qualification or factor will not be found to be discriminatory if it can be established that it is reasonable and bona fide in the circumstances. In order to do so, the requirement must be reasonable and *bona fide* in the circumstances, unless it can be shown that the needs of the group adversely affected “cannot be accommodated without undue hardship on the person responsible for accommodating those needs...” Factors that would determine whether a required accommodation poses an undue hardship include the cost of the accommodation, outside sources of funding, if any, and health and safety requirements, if any.

If an employer refuses to hire or promote an employee, if a sales clerk chooses to serve only particular customers, or a building manager is consistently rude to certain tenants because of a characteristic that is closely related to grounds under the *Code*, these actions may give rise to a complaint. Language is a characteristic that is often closely associated with ancestry, ethnic origin or place of origin. Thus, the *Code* may be breached where a language requirement, such as “proficiency” in English,¹¹ excludes, gives preference to, or restricts persons because of their ancestry, ethnic origin or place of origin.

5. *Bona Fide Occupational Requirement*

The Commission recognizes that proficiency in a certain language may be a reasonable and legitimate requirement for employment. For example, if English-language proficiency is required for a position, it should be established as a *bona fide* occupational requirement. The test for determining if a qualification is *bona fide* must be an objective one. The requirement for English proficiency, and the degree of proficiency required,¹² must bear an objective relationship to the essential requirements of the job, and be a *bona fide* occupational requirement that is imposed in good faith.¹³

Example: A supervisor in British Columbia refused to hire a South Asian man for an entry level position in a lumber mill. According to the supervisor, the applicant “could not speak English”. A board of inquiry found that the requirement of proficiency in English was not a *bona fide* occupational requirement for the position, and that the complainant’s level of English was good enough to allow him to complete a course on lumber grading in English and obtain high marks. The board of inquiry went on to find that the supervisor’s refusal to hire the complainant was in fact motivated by race and place of origin, not lack of proficiency in English, and therefore constituted an infringement of his rights under the (British Columbia) *Human Rights Act*.¹⁴

Fluency in a particular language could be a *bona fide* requirement in some employment or service situations.

Example: An agency that serves persons from Central America requires support workers who can also act as refugee advocates. The functions of the position include providing support to clients at refugee board hearings. Fluency in Spanish in addition to English (or French) would likely be considered a *bona fide* requirement for the position.

In these circumstances, the requirement for the position must focus on the particular language needed to function in the job, and not on the place of origin, ancestry, ethnic origin or race of candidates for the position. In the above example, if an applicant is qualified and speaks fluently in Spanish and English, but does not come from a Central American country, she could not be denied the position unless the agency could justify a defence under section 24(1)(a) of the *Code*.

6. Relevant Ontario *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 1, 2(1), 3, 5(1)(2), 6, 8, 9, 11(1), and 24(1).

ENDNOTES

- ¹ At present, Quebec and the Yukon Territory are the only Canadian jurisdictions which specifically state that language is a prohibited ground of discrimination in the area of employment.
- ² Sign language is not included in this policy as it is directly related to the ground of "handicap" which is protected under the *Code*. Issues relating to persons who sign are addressed in the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.
- ³ In accordance with s. 10 of the *Interpretation Act* R.S.O. 1990, c.l.11, the *Code* is to be given a fair, large and liberal interpretation. See also *Cousens v. Canadian Nurses Association* (1981), 2 C.H.R.R. D/365 (Ont. Bd. of Inquiry).
- ⁴ *Espinoza v. Coldmatic Refrigeration of Canada Inc. et al.*, March 31, 1995), unreported, Harman, R. (Ont. Bd. of Inquiry).
- ⁵ "Mother tongue": see further *Supra*, note 3, Cousens. It should also be noted that there maybe a violation of the *Code*, based on "place of origin", when English as a "mother tongue" is a job requirement.
- ⁶ Discrimination against a regional accent may also constitute an infringement of the *Code* on the basis of "place of origin". "Place of origin" may cover situations where the characteristics of a person are, to the respondent, strongly associated with a particular region, that trigger discrimination. For example, an Aboriginal man from Northern Ontario and a woman from Newfoundland may both speak with an accent typical of the regions where they live. If they are denied employment because of their accent, they may file a complaint with the Commission on the basis of "place of origin". (see further Judith Keene, *Human Rights in Ontario* (2d) (Toronto: Carswell, 1992) at 53.
- ⁷ *Gajecki v. Surrey School District* (No. 36) (1989) 11 C.H.R.R. D/326 (B.C. Council of H.R.). See also *Segula v. Ferrante, Ball Packaging Products Inc.* (March 3, 1995), (unreported), Leighton, D. (Ont. Bd. of Inquiry).
- ⁸ The subjective element of this definition assumes that the person responsible for the behaviour knows that his/her comments or actions are unwelcome. The objective element is based on the assumption that the person should reasonably know that his/her behaviour is unwelcome.
- ⁹ The Supreme Court of Canada upheld the concept of "poisoned environment" in *Attis v. The Board of School Trustees, District No. 15 and The Human Rights Commission of New Brunswick et al.* (April 3, 1996), (S.C.C.) [unreported].
- ¹⁰ *R. v. Bushnell Communications Ltd. et al.* (1974) 1 O.R. (2d) 442; *aff'd* (1974) O.R. (2d) 288.
- ¹¹ Studies have shown that there is a significant relationship between English-language proficiency and discriminatory experiences, and that these experiences are not limited to employment (see further Racism and Chinese-Canadian Business Participation, prepared for the Chinese Information and Community Services, Toronto, March 1996). That is, persons with low levels of language skills are more likely to experience discrimination in employment, services in housing accommodation.
- ¹² The degree of proficiency required must be objectively determined. There may also be situations where a certain level of language requirement is justifiable for a particular position.

Example: A store clerk should have sufficient language skills to be able to communicate with customers. Other occupations may require only a basic understanding of English and if there is no contact with the public limited communication skills may be adequate for the position. In these situations, requiring a high level of English-language proficiency would not be a *bona fide* occupational requirement.

On the other hand, a politician may need to hire an executive who is fluent in several Chinese dialects in order to serve her large Chinese-speaking constituency. In which case, fluency in particular Chinese dialects may be a *bona fide* occupational requirement.

¹³ *Ontario (Human Rights Commission) v. Etobicoke (Borough)* [1982] 1 S.C.R. 202.

¹⁴ *Dhaliwal v. B.C. Timber Ltd.* (1983), 4 C.H.R.R. D/1520 (B.C. Bd. of Inq.).

POLICY ON DISCRIMINATION BECAUSE OF PREGNANCY

Approved by the Commission: September 11, 1996

POLICY ON DISCRIMINATION BECAUSE OF PREGNANCY

1. Introduction

The Ontario *Human Rights Code* (the "*Code*") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

The *Code* prohibits discrimination because of sex. Section 10(2) of the *Code* establishes that the right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is, was, or may become pregnant or because she has had a baby.

In addition, section 11 of the *Code* provides that it is also discriminatory if a workplace rule or requirement results in an adverse impact on persons who are identified by a prohibited ground of discrimination, except where the requirement, qualification or factor is reasonable and *bona fide* in the circumstances. In other words, rules and requirements that are neutral on their face may have a discriminatory impact.

Most of the complaints filed with the Ontario Human Rights Commission (the "Commission") by women alleging discrimination because of pregnancy are related to the workplace. Nevertheless, the right to equal treatment without discrimination because of sex or pregnancy extends to accommodation (housing, *etc.*), services, goods and facilities, contracts and membership in trade unions.

This policy has several purposes:

- to help the public understand how the *Code* protects women against discrimination because of pregnancy;

- to make women aware of their right to equal treatment in employment, accommodation, services, goods and facilities, contracts and membership in trade unions, without discrimination because they are, or may become pregnant; and
- to assist employers and providers of services and accommodation, to understand that they also have responsibilities under the *Code* to accommodate the needs of women who are, or may become, pregnant.

2. Background

Anti-discrimination legislation seeks to address and remove unfair disadvantages that result from the fact that a person belongs to a group identified under the *Code*. Child-bearing benefits society as a whole and therefore women should not be disadvantaged as a result of being pregnant.¹ The Supreme Court of Canada has recognized that the financial and social burdens and the cost associated with having children should not rest entirely on women.²

Unfortunately, discrimination against women because of pregnancy continues to be a common practice in society, particularly in employment. Many women who are, or may become, pregnant do not know how their employers will respond to the employee's pregnancy. This often results in these women experiencing considerable stress and even fear that they may lose their job.

Women who are pregnant may experience varying forms and degrees of discrimination, depending on what other characteristics form part of their personal identity or status in society. For example, pregnant women who receive social assistance, or who are young, single, involved in a same-sex relationship, or who have a disability, are often more vulnerable and therefore more likely to be subject to discriminatory behaviour than pregnant women who are in a traditional family structure.

3. Meaning of Pregnancy

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is, was or may become pregnant or because she has had a baby. "Pregnancy" therefore includes the process of pregnancy from conception up to the period following childbirth and includes the post-delivery period.³ The term "pregnancy" takes into account all the special needs and circumstances

of a pregnant woman and recognizes that the experiences of women will differ.

Special needs can be related to circumstances arising from:

- miscarriage;
- abortion;
- complications because of pregnancy or childbirth;
- conditions which result directly or indirectly from an abortion/miscarriage; and
- recovery from childbirth.⁴

4. Discrimination “Because of Pregnancy” is Discrimination Based on Sex

Only a woman can become pregnant, so pregnancy is a characteristic that is necessarily linked to a woman's sex.⁵ Section 10(2) of the *Code* states that:

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

5. Other Relevant Grounds of Discrimination Under the *Code*

5.1 Family status

In addition to sex, discrimination can occur because of one's family status. “Family status” is defined in section 10(1) of the *Code* and refers to:

... the status of being in a parent and child relationship.

There are numerous stereotypes about a mother with a young child, particularly about her ability to continue working. For example, some believe that a mother who has an infant at home may miss work more often than employees who do not have a young family. Others may feel that hiring or keeping an employee who may become pregnant or who is on maternity leave costs the company too much. However, Boards of Inquiry have rejected the argument that the cost of upgrading or retraining a woman after she returns from maternity leave is a defence to discriminating against a woman because of her family status.

6. Other Relevant Sections of the Code

The *Code* protects women against discrimination in the workplace (section 5); in services (section 1); in accommodation (e.g. housing) (section 2); contracts (section 3); and membership in trade unions (section 6). The *Code* also specifically prohibits harassment because of sex in accommodation (section 7(1)) and employment (section 7(2)).

Section 11 of the *Code* provides protection from constructive discrimination for women who are, were or may become pregnant, or who have had a baby, when there is a rule, requirement or factor which may not be discriminatory on the surface, but when applied may have an adverse impact on women because of pregnancy.

7. Employment (section 5)

7.1 Hiring, Promotions, Transfers, Termination

Subject to *bona fide* requirements, denying or restricting employment opportunities in hiring, or transferring *etc.*, a woman because she is, was or may become pregnant or because she has had a baby, is a violation of the *Code*. Certain work-related practices or behaviours may also constitute discrimination, such as:

- limiting or withholding employment opportunities, or withholding training, regardless of work performance or years of service;
- not assigning a pregnant woman to a major project or team projects;
- a manager being overly critical of her work;
- docking a pregnant woman's time for using the washroom more frequently;
- making a pregnant woman the subject of inappropriate comments or jokes;
- terminating her with or without notice;
- unwanted transfers; and
- denying sick leave benefits.

(See “*Endnotes*” for detailed examples.⁶⁾)

Even if pregnancy or being of child-bearing age is only one of the factors in a decision to deny a woman employment-related opportunities, this could nevertheless constitute a violation of a woman's right to freedom from discrimination under the *Code*.⁷ A woman loses more than just a job or a promotion when she is discriminated against because of pregnancy. She experiences a

"missed opportunity", which has far greater consequences for her employment prospects

If an employee is terminated for any reason related to pregnancy, the employer may be found to have violated her rights under the *Code* and the *Employment Standards Act*, R.S.O. 1990, E-14.

7.2 *Bona Fide Occupational Requirement*

In some circumstances, differential treatment of a woman because she is, was or may become, pregnant may be legitimate if it can be demonstrated that not being pregnant is a *bona fide* occupational requirement.

Example: A woman who was seven months pregnant was denied a position as kitchen help in a restaurant. The Board of Inquiry heard evidence that the position would be physically demanding. As the woman had never performed these kitchen duties she would not know the extent of the duties and physical requirements expected for this job. The Board of Inquiry was satisfied in this particular instance that it was likely that not being in the later stages of pregnancy was a reasonable occupational requirement.⁸

To be considered a *bona fide* occupational requirement under human rights legislation, the requirement, qualification or factor must be imposed in good faith and be reasonable from an objective viewpoint.⁹ Case law and Boards of Inquiry apply a very high standard before accepting the defence of a *bona fide* occupational requirement. In other words, certain restrictions may have a rational or reasonable connection to the occupation and are therefore acceptable defences. Without such a connection to the occupation the employer will not have a defence of a *bona fide* occupational requirement.

Example: A Board of Inquiry found that an employer had discriminated against a female employee when it refused to employ her in a section of the company that processed certain gases. The employer defended its action on the basis that, from time to time, there are accidental emissions of a gas which may be harmful to women of child-bearing age or to a fetus. The Board of Inquiry found that the risk of harm to a fetus from the accidental emission of the gas was minimal. As well, the scientific research did not support the company's concerns. The Board of Inquiry noted that any woman who knows she is pregnant or who intends to become pregnant, could be transferred from this section until after she has given birth.¹⁰

7.3 Duty to Accommodate

In order for a requirement to be a reasonable and *bona fide* in the circumstances, it must be shown that the needs of the particular group protected under the *Code* cannot be accommodated “short of undue hardship”. “Short of undue hardship” is a standard that applies to the person required to make the accommodation, and takes into consideration costs, as well as health and safety factors.

The Supreme Court of Canada in *Brooks v. Canada Safeway* established that discrimination against women because of pregnancy includes not only discriminatory action, but also the failure to accommodate the special needs of persons who fall into this category.

Special needs during the pre-natal and post-natal period can be accommodated, short of undue hardship, in a variety of ways, including:

- temporary relocation to another work station or location, or re-assignment of duties;
- providing a flexible work schedule to accommodate medical appointments, including treatment for infertility;
- allowing for breaks as necessary;
- providing a supportive environment for a woman who is breast-feeding.

Accommodation may mean allowing the care-giver to bring the baby into the workplace and providing a feeding area that assures a degree of privacy. A supportive environment can be created with minimum disruption.

When the application of a rule has an adverse impact on women who are, were, or may become pregnant or those who have had a baby, the rule may violate their rights under the *Code*. Consideration should be given to introducing an appropriate accommodation measure, short of undue hardship.

Example: A police officer requested light duties for the last stages of her pregnancy. The Police Force had a policy that did not provide a modified work program and her request for light duties was denied. Instead, she was told that she could take a part-time civilian position at a much lower salary. This meant that the officer would have to resign from the force. The Board of Inquiry stated the rule of “no modified duties” was applied to all officers but it clearly excluded “pregnant women from consideration of the fact they are at higher risk during the latter stages of their pregnancy”. It found that the accommodation offered was unreasonable because other male

officers who were injured were given lighter duties. The Board of Inquiry concluded that the Police Force discriminated against the police officer because of her sex.¹¹

In this example, the policy was applied equally to all police officers and, on its face, did not discriminate. However, because the rule adversely affected those who became pregnant, it constituted "constructive discrimination" in relation to pregnant women. The uniform application of the policy of not providing modified duties resulted in pregnant police officers being negatively affected.

It is important to note that an employer cannot arbitrarily decide that a pregnant employee should take a leave of absence as an accommodation measure, without considering other options for dealing with a situation requiring accommodation, in consultation with the affected employee.

7.3.1 Employee's and Employer's Responsibility

Both the employee and the employer share the responsibility for determining the most appropriate form of accommodation that a given set of circumstances may require.

- If a pregnant employee is advised by her doctor that she can no longer work in a particular job, she is responsible for clearly informing the employer of her need for accommodation and of the accommodation required.
- Once the employer is aware of what accommodation is required, the employer has a duty to take the necessary steps to accommodate the special needs and circumstances of the pregnant employee, short of undue hardship.¹²
- The employer cannot insist that the employee take an unpaid leave of absence as an accommodation measure. Accommodation should be provided in a way which most nominally affects the employee's rights.

Under the *Code*, employers must demonstrate that a particular form of accommodation would lead to excessive costs or health and safety concerns, in order to justify a claim of undue hardship.

7.4 Benefit Plans

With one exception that is discussed below, employee benefit plans or employment practices that result in disadvantage because of pregnancy¹³

constitute discrimination under the Code on the basis of sex and pregnancy.¹⁴

A recent Divisional Court decision, *Crook v. Ontario Cancer Treatment and Research Foundation*, confirmed the Board of Inquiry's decision that sick leave benefits should be available, for health-related reasons, to a woman who has recently given birth when she has chosen to go on maternity leave under the *Employment Standards Act*.¹⁵

7.5 Health-Related Absences¹⁶

In the *Brooks* decision, the Supreme Court of Canada said that pregnancy leave should be included in employee benefit plans without having to be categorized as an illness, accident or a disability. Under the *Brooks* doctrine, if a pregnant employee produces proof that she must be absent from work for health-related reasons, at whatever stage this might be during the pregnancy, she cannot be treated differently or adversely from other employees who are also absent from work for other "health-related reasons".

"Health" was broadly defined in the *Brooks* decision to include:

- the physical and psychological health of the woman;
- the health, well-being, growth and development of the fetus; and
- a woman's ability to function as a social being, interacting with her family, employer and significant others.

A "health-related absence from work" can therefore mean any absence that is related to a woman's health or the health and well-being of the fetus.

Pregnancy leave is used for bonding and nurturing. As well, different women have different medical and physiological needs following childbirth, depending on their circumstances, and the time required to recover from childbirth varies. Because women respond differently to pregnancy, requests for health-related absences are usually assessed and granted on an individual basis. Pregnant employees who require leave for health-related pregnancy concerns should follow the proof-of-claim procedures of the employer's benefit plan to establish that the health-related absence is valid.

An Alberta court decision in *Alberta Hospital Association v. Parcels* endorsed the *Brooks* principle that a health-related reason for absence from the workplace by a pregnant employee is not to be treated differently from other health-related absences.¹⁷ This applies generally where the woman is pregnant and where the condition which requires time off is associated with pregnancy.

The court in *Parcels* concluded that:

- Where an employer has a benefit plan that compensates health-related absences or provides disability benefits to its employees, a woman should be entitled to disability benefits during that portion of the pregnancy or parental leave that she is unable to work for health reasons related to the pregnancy and childbirth. Payment must begin as soon as the pregnant woman is away from the workplace for a health-related reason.
- Any health-related portion of maternity leave is to be treated the same as other health-related leaves, such as a sick leave or disability leave. The employee should be compensated at substantially the same level and should be subject to the same conditions as an employee who becomes ill, such as the requirement to provide a medical confirmation for the absence.¹⁸
- Pregnant employees are to be compensated for the full period of their health-related absence, whether it occurs during the pre-natal to post-natal period, including recovery from childbirth.

These principles are consistent with the general tenet in *Brooks* that women who are absent for health reasons related to their pregnancy should not be treated differently from employees absent for other health-related reasons. However, in Ontario, *Brooks* and *Parcels* have not been fully integrated into the legal protections available to women who are absent for pregnancy-related health reasons.

Section 25(2) of the *Code*, in conjunction with the *Employment Standard Act*,¹⁹ permits health-related absences because of pregnancy during maternity leave to be treated differently from other health-related absences where a workplace disability plan is based on a contract of group insurance. Such a plan is defined in an *Employment Standards Act* ("ESA") regulation,²⁰ to include any plan, fund or arrangement that insures against loss of income because of sickness, accident or disability and includes short and long term income insurance or benefit plans.

Practically speaking, this means that the right to receive benefits under disability plans ends when a woman chooses to go on to a Part XI leave under the *ESA* (pregnancy or parental leave). But if an employer offers disability benefits to other employees who are off on other kinds of leave such as educational leaves or sabbaticals, then the *ESA* provides that benefits should also be paid to women on pregnancy leave and parental leave.

Finally, a woman may have health problems related to her pregnancy that forces her to be away from work before or after her pregnancy leave or parental leave. She can access health benefits under a workplace sick or

disability plan in this situation. However, she should check her dates of leave with the Employment Standards Branch at the Ministry of Labour since her decision to take short or long term disability leave may affect her right to take pregnancy and/or parental leave. There are strict rules about when she is entitled to take pregnancy or parental leave and when she must notify her employer.

Regardless of whether or not a sick-leave plan is based on a contract of group insurance, women on maternity leave continue to be entitled to other benefits under employment-related benefit plans including pension plans, life insurance plans, accidental death plans, extended health plans and dental plans.²¹ Employers are also required to continue to make contributions to such plans.²²

7.6 Special Programs: Section 14

Section 14 of the *Code*, which deals with “special programs”, allows for differential treatment of persons protected under the *Code* if that program is designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve equality of opportunity. The purpose of maternity leave (both health-related and voluntary portions) is to address the circumstances related to pregnancy. Women have experienced, and continue to experience, considerable disadvantage in employment, housing, etc. because of pregnancy. As previously noted, the Supreme Court of Canada has acknowledged that the cost associated with bearing children rests disproportionately on women.

Section 14 recognizes that:

- “special programs” that are designed to relieve hardship or economic disadvantage or to achieve equality are necessary and legitimate;
- the equality rights provisions of the *Code* are not infringed by the implementation of a special program.

For further information on the application of section 14 please refer to the Commission's *Guidelines on Special Programs*.

7.7 Harassment/Poisoned Environment

Actual intention to harass is not required to establish evidence of a poisoned environment. If the comment or conduct is known or ought reasonably to be known to be unwelcome, it may be considered as “harassment”. The phrase “ought to have known” introduces an objective element to the test.²³ Ongoing jokes and comments or derogatory statements made about

pregnant women in a workplace or service setting, may create a "poisoned environment" for women by making them feel harassed, threatened or uncomfortable.

8. Accommodation (e.g., housing) (Section 2)

Section 2 of the *Code* protects a woman who is, was, or may become pregnant, or has had a baby, against discrimination in housing.

Example: A young woman shared a two-bedroom apartment with various roommates. The owners were aware of the arrangement, and she received their approval for each new co-tenant. She was later involved with one of these co-tenants and became pregnant. When the superintendent found out she was pregnant, he asked her if she was "intending to give up the baby for adoption" and said that the owners "didn't want kids in the building". The Board of Inquiry found that the complainant had been discriminated against because of her sex and family status. In the Board's view, one of the main reasons he was evicted "was her pending motherhood".²⁴

A Board of Inquiry had also decided that "Adult Only" rules in condominiums discriminate on the grounds of "family status".²⁵

9. Services, Goods and Facilities (Section 1)

The *Code* prohibits discrimination in "services, goods and facilities" against women who are pregnant. This means that women who are pregnant, or who are accompanied by their newborn babies to a restaurant or a theatre, cannot be denied service or access unless there is a *bona fide* reason for doing so.

The *Code* prohibits discrimination in "services, goods and facilities" against women who are breast-feeding. This means that a woman cannot be prevented from breast-feeding a child in, for example, a public area or restaurant. She also cannot be asked to move to a more "discreet" area to breast-feed a child.

The *Code*, however, allows for an exception under section 22. This section permits individual and group insurance policies, which are offered as a service, to make distinctions based on sex if the distinctions are made on *reasonable* and *bona fide* grounds. In *Bates v. Zurich*,²⁶ the Supreme Court of Canada stated that a discriminatory practice in the insurance industry is "reasonable" if:

- (a) it is based on a sound and accepted insurance practice; and

(b) there is no practical alternative.

Example: A professional association offers as a service to its members an optional insurance policy. The policy has a specific provision requiring a 30-day pre-existing condition restriction that applies only to women who are pregnant. This means that a woman who is pregnant at the time she applies for the policy is not eligible for coverage. If a pregnant woman challenges this requirement, the insurance provider, and possibly the professional association, would have to show that this requirement meets the test of a sound and accepted insurance practice and that there is no practical alternative, according to *Bates v. Zurich*.

10. Collective Agreements and Company Policies

Employers and labour representatives are recognizing their obligations under the *Code*, as well as their shared responsibility to maintain workplace environments that are free from discrimination.

A woman who is pregnant may have rights that can be pursued by a grievance under a collective agreement. Provincial labour laws allow arbitrators to apply and interpret the *Code* to grievances which involve human rights violations.²⁷ Some issues that may be more appropriately dealt with through the grievance process include:

- whether a pregnant woman can use sick leave and annual vacation leave for maternity leave;²⁸
- whether sick-leave days and vacation leave can be accumulated while a woman is on maternity leave;²⁹
- seniority issues relating to maternity leave.³⁰

Persons are not obligated to exhaust an internal complaint-resolution mechanism before considering other avenues of complaint such as approaching the Commission or filing a grievance. An individual may elect to file two complaints at the same time — one under the employer's internal policy and one with the Commission. However, if there is a grievance procedure in place under a collective agreement, the Commission may elect to exercise its discretion under section 34 of the *Code*, and decide not to deal with a complaint. This is because section 48(11)(j) of the *Labour Relations Act* allows labour arbitrators to interpret and apply human rights legislation.

Internal anti-harassment and anti-discrimination policies are not governed by provincial legislation and the Commission does not consider them in the same way as the grievance procedure under a collective agreement.

This means that if the complainant is not satisfied with the resolution, s/he can contact the Commission. If this is the case, the complaint should be filed within the six-month limitation period, which begins from the time of the alleged harassment. If a complaint is not filed within the time frame, the Commission may decide not to deal with the complaint, subject to section 34 (1)(d) of the *Code*.

11. Employment Standards Act

The *Code* protects women's right to equal treatment in employment without discrimination because they are, were or intend to become pregnant. The *Employment Standards Act* (the "ESA") has a focus which is different from the *Code*. It identifies the employee's and employer's responsibilities concerning maternity leave and job security. Sections 34 to 44 of the *ESA* provide for the following:

- identification of the employee's and employer's responsibilities concerning maternity leave and job security;
- establishment of the requirements for qualifying for maternity and parental leave, and ensuring that women have a job to return to; and
- setting out the employer's responsibility to maintain certain benefits on the woman's behalf while she is absent on leave.

(For detailed information on the *ESA*, please contact the Employment Standards Branch of the Ministry of Labour.)

11.1 Related Provisions Under the *Employment Standards Act*

- Short- or long-term disability insurance plans may treat women on maternity leave differently from employees who are absent from work for other health reasons. (Regulation 321, s. 8(c); s. 33(2))
- Employees are eligible to qualify for maternity/parental leave after 13 weeks of continuous permanent or contract employment. (s. 35)
- The employee is responsible for notifying the employer of the amount of time required for leave. (s. 35(3))
- Pregnancy leave: standard 17 weeks, unless otherwise agreed to; entitled to at least 6 weeks' leave after delivery. (s. 37)
- Parental leave: 18 weeks. (s. 40)
- The employer must reinstate the employee to the same or comparable position, with the same wage, following absence because of pregnancy leave. (s. 43(1))

- Seniority rights will continue to accrue during leave. (Note: Issues concerning reinstatement are to be directed to the Employment Standards Branch of the Ministry of Labour.) (s. 42(4))
- The employer is required to maintain pension plan contributions, health insurance premiums and other benefit plan contributions, unless the employee elects in writing not to pay her/his share of the contribution. (s. 42(2), (3))
- The employer cannot discipline or penalize an employee who takes, intends to take, or is eligible to take pregnancy or parental leave. (s. 44)

12. Relevant Code Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 1, 2(1)(2), 3, 5(1)(2), 6, 7(1)(2), 8, 10(2), 11(1)(2), and 22.

ENDNOTES

¹ *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

² *Ibid.* It should also be noted that Canada is a signatory to the United Nations' International Covenant on Economic, Social and Cultural Rights. Article 10(2) of the Covenant states that:

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

³ The length of the post-delivery period covered by human rights protections is dependent on the circumstances of the mother. *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.); *Parcels v. Red Deer General & Auxiliary Hospital Nursing Home* (Dist. No. 15) (1991), 15 C.H.R.R. D/257 (Alta. Bd. of Inq.).

⁴ "Pregnancy" is understood to extend beyond the date of delivery and post-delivery recovery, which is included in the definition of "pregnancy". The length of time is dependent on the circumstances of the mother. See further *Parcels*, *ibid.*

⁵ *Supra*, note 1.

⁶ The following are examples of situations where Boards of Inquiry have found that a woman's right to be free from discrimination because she is or may become pregnant has been violated:

Examples

- **Hiring:** A pregnant woman was offered a position as a clerk, but when the employer learned that she was pregnant, the offer was withdrawn. A Board of Inquiry found that she was denied employment because she was pregnant and this constituted discrimination. It also found that the woman was entitled to compensation for lost unemployment insurance benefits for which she would have qualified had she not been denied the opportunity to work. If the employer had hired her as agreed, she would have received wages. "But for the discrimination", her employer would have made the appropriate deductions and therefore she would have been entitled to unemployment insurance benefits. *McAlpine v. Canada (Canadian Forces)* (1988), 9 C.H.R.R. D/5190 (CHRT). See also *Jenner v. Point West Development Corp.* (1990), 21 C.H.R.R. D/336 (Ont. Bd. of Inquiry). In the *Jenner* decision, the Board of Inquiry found that the question of the complainant being available to work was so clearly linked with pregnancy and being a woman that the employer's decision not to hire her because she would not be available for the whole season amounts to deciding not to hire because she was pregnant.
- **Promotion:** The B.C. Human Rights Council (B.C.H.R.C.) found that the employer discriminated against a pregnant employee when the employer failed to consider her for a promotion. Instead, she was *demoted* immediately before she was scheduled to go on maternity leave. The Board of Inquiry reviewed evidence that the employee was not provided with a written evaluation of her performance and that less than a standard period of time was allowed for the employee to meet performance objectives. It concluded that these also constituted discrimination on the basis of pregnancy. See further *Magee v. Warner Lambert Canada* (1990), 12 C.H.R.R. D/208 (B.C.H.R.C.).
- **Termination:** The B.C. Human Rights Council found that a complainant was discriminated against when she was dismissed from her job as a cocktail waitress because she was pregnant. The employer had argued that it was not appropriate for a cocktail waitress to be pregnant. The Board of Inquiry did not accept the employer's argument that not being pregnant was a bona fide occupational requirement. In another situation, the Board of Inquiry found that the employer discriminated against the employee by refusing her a transfer from the employer's Saskatoon office to the Edmonton office

and then terminating her, because she was pregnant. The employer did not want to replace the pregnant employee during her absence on maternity leave. *Infra*, note 7, Stefanyshyn; *Wormsbecker v. SuperValu and Westfair Foods Ltd.* (1983), 4 C.H.R.R. D/1443.

- ⁷ *Riggio v. Sheppard Coiffures Ltd.* (1988), 9 C.H.R.R. D/4520 (Ont. Bd. of Inquiry); *Stefanyshyn v. 4 Seasons Management Ltd.* (4 Seasons Racquet Club) (1987), 8 C.H.R.R. (B.C.H.R.C).
- ⁸ *Mack v. Marivtsan* (1989) 10 C.H.R.R. D/5892 (Sask. Bd. of Inq.).
- ⁹ *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202.
- ¹⁰ *Wiens v. Inco Metals Co.* (1988), 9 C.H.R.R. D/4795 (Ont. Bd. of Inquiry).
- ¹¹ *Julie Lord v. Haldimand-Norfolk Police Services Board* (June 14, 1995), unreported, Mikus, L. (Ont. Bd. of Inquiry). See also, *Emrick Plastics v. Ontario* (Human Rights Commission) (1992), 16 C.H.R.R. 300 (Div. Ct.), *Hienke v. Brownell* (1991), 14 C.H.R.R. D/68/ (Ont. Bd. of Inquiry); *Re Orangeville Police Services Board and Orangeville Police Assn* (1994) 40 L.A.C. (4th) 269.
- ¹² In a recent decision, *Tammy Turnbull v. 539821 Ontario Ltd. — Andre's Restaurant* (June 21, 1996) unreported, McKellar, M.A. (Ont. Bd. of Inquiry), the Board of Inquiry decided that because the employer knew the employee was pregnant, the employer was responsible for accommodating her even if she did not specifically request accommodation.
- ¹³ Please note that section 25(2) of the *Code* permits a sick leave plan based on a contract of group insurance to treat women absent due to pregnancy-related health reasons differently from employees off work for other health-related reasons in certain circumstances. However, in light of the *Brooks* decision, *supra* note 1, it is unclear whether the provisions of section 25(2) relating to the provision of sick leave benefits to women on maternity leave would withstand a constitutional challenge.
- ¹⁴ *Ibid.* Also, in the decision of *Alberta Hospital Association v. Parcels*, *supra* note 3, the Alberta Queen's Bench held that employers can use supplementary Unemployment Insurance (now called Employment Insurance) plans to offset increased costs of maternity leave. It also stated that the benefits provided in this manner do not have to be identical to sick leave benefits as long as they are substantially the same.
- ¹⁵ *Ontario Cancer Treatment & Research Foundation v. Ontario (Human Rights Commission)* (1998), 34 C.C.E.L. (2d) 56, 108 O.A.C. 289 (Ont. Div. Ct.); upholding *Crook v. Ontario Cancer Treatment & Research Foundation (No.3)* (1996), 30 C.H.R.R. D/104 (Ont. Bd. of Inquiry).
- ¹⁶ While pregnancy is an entirely normal condition, serious medical complications can arise involving some period of time during which the woman is unable to work. Pregnancy itself, cannot be classified as an illness; it is a unique condition which does not fit appropriately into any other category for compensating time lost from work.

After several years of debating whether or not pregnancy is "akin" to sickness or disability, the courts and provincial legislatures have acknowledged that the special needs associated with pregnancy do not correspond to any other health-related condition. This recognition was crucial to advancing the development of pregnancy-related benefits.

- ¹⁷ *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.).
- ¹⁸ See further *Stagg v. Intercontinental Packers Ltd.* (1992), 18 C.H.R.R. D/392 (Sask. Bd. of Inq.).
- ¹⁹ Section 33(2) of the *Employment Standards Act*, R.S.O. 1990, c.E.14 states:

Except as provided in the regulations, no employer or person acting directly on behalf of an employer shall provide, furnish or offer any fund, plan, arrangement or benefit that differentiates or makes any distinction, exclusion

or preference between employees or a class or classes of employees or their beneficiaries, survivors or dependants because of the age, sex or marital status of the employees.

Section 8(c) of Ontario Regulation 321, R.R.O.1990 states:

The prohibition in subsection 33(2) of the Act does not apply to, ...

- (a) the exclusion from benefits under a short or long term disability insurance plan of a female employee during the period of leave-of-absence to which she is entitled under Part XI of the Act, or any greater period of leave-of-absence that she has applied for under any term of a contract of employment, oral or written, express or implied, that prevails over Part XI of the Act.

Section 10 of the Regulation states:

A plan, fund or arrangement to which Part X of the Act applies shall not disentitle an employee who is on leave-of-absence under Part XI of the Act, or any greater period of leave-of-absence that the employee has applied for under any term of contract of employment, oral or written, express or implied, that prevails under section 4 of the Act from continuing to participate therein during such leave-of-absence where the plan, fund or arrangement entitles an employee who is on leave-of-absence other than a leave of absence under Part XI of the Act, or such greater period of leave-of-absence to continue to participate therein.

²⁰ Regulation 321 to the *Employment Standards Act*, section 1.

²¹ Subsections 42(1) and (2) of the *Employment Standards Act*.

²² Subsection 42(3) of the *Employment Standards Act*.

²³ See section 10 of the *Code* for the definition of "harassment".

²⁴ *Peterson v. Anderson* (1992), 15 C.H.R.R. D/1 (Ont. Bd. of Inquiry).

²⁵ See further *Dudnik v. York Condominium Corp. No. 216* (1990), 12 C.H.R.R. D/325 (Ont. Bd. of Inquiry), reversed in part (1991) (*sub nom. York Condominium Corp. No. 216 v. Dudnik* 79 D.L.R. (4th) 161 (Div. Ct)).

²⁶ *Zurich Insurance Co. v. Ontario (Human Rights Commission)* (*sum nom. Bates v. Zurich Insurance Co. of Canada*) (1985), 6 C.H.R.R. D/2948 (Ont. Bd. of Inquiry); reversed 8 C.H.R.R. D/4069; (*sub nom. Ontario (Human Rights Commission) v. Zurich Insurance Co.*) 10 O.A.C. 220 (Div. Ct.), affirmed (1989), 70 O.R. (2d) 639, leave to appeal granted (1990), 73 O.R. (2d) x (note) (S.C.C.); affirmed [1992] 2 S.C.R. 321.

²⁷ Bill 7 amended the *Labour Relations Act* (section 48 (12)(j)) to permit arbitrators to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.

²⁸ See *Ontario Secondary School Teachers' Federation (District 34) v. Essex County Board of Education*, (April 4, 1996), unreported, Adams, J. (Ont. Div. Ct.).

²⁹ Where the sick leave or vacation leave or pay is calculated based on the period of time that a person has been "in service" or "continuously employed", most arbitrators have held that employees who were off work because of maternity leave were entitled to include the period of time that they were not at work. If the collective agreement clearly excludes women who are on maternity leave from accruing sick leave or vacation leave/pay, the grievor should consider filing a human rights complaint with the Commission.

³⁰ Where the terms of the collective agreement indicate or imply that seniority is based on "service", seniority should accumulate during maternity leave. If the collective agreement says that seniority will not accrue while off on maternity leave, a complaint can be filed with the Commission.

POLICY ON DRUG AND ALCOHOL TESTING

Approved by the Commission: November 27, 1996

Revised: September 27, 2000

POLICY ON DRUG AND ALCOHOL TESTING

1. Introduction

The Ontario *Human Rights Code* (the “*Code*”) states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

The Commission recognizes that it is a legitimate goal for employers to have a safe workplace. One method sometimes used by employers to achieve that goal is drug and alcohol testing. However, such testing is controversial and, especially in the area of drug testing, of limited effectiveness as an indicator of impairment. It is not used to a significant degree anywhere in the world except in the United States (the “U.S.”).¹

It is the Commission's view that such testing is *prima facie* discriminatory and can only be used in limited circumstances. The primary reason for conducting such testing should be to measure impairment.² Even testing that measures impairment can be justified only if it is demonstrably connected to the performance of the job, for example, if an employee occupies a safety-sensitive position, or after significant accidents or “near-misses”, or if there is reasonable cause to believe that a person is abusing alcohol or drugs and only then as part of a larger assessment of drug and alcohol abuse. It is the Commission's view that by focusing on testing that actually measures impairment, especially in jobs that are safety sensitive, an appropriate balance can be struck between human rights and safety requirements, both for employees and for the public.

2. Scope of This Policy

Persons with disabilities, who have had disabilities, or who are perceived to have or have had disabilities are protected against discrimination in all of the social areas of the *Code*.

Drug and alcohol testing are of particular concern in the workplace, notably for those Ontario employers who have safety-sensitive operations, and/or that are subject to U.S. regulatory requirements (e.g. the trucking industry),³ or to the policies of U.S. affiliates with "zero tolerance" for the consumption of drugs or alcohol. For this reason, this Policy focuses on the workplace. However, it applies to other social areas as well.⁴ For example, the Commission has taken the position that drug or alcohol testing as a prerequisite to eligibility for basic income support programs is also *prima facie* discriminatory.⁵

It should be noted that international and interprovincial transportation companies are under federal jurisdiction.⁶ Thus airlines, interprovincial trucking and bus services are subject to the federal *Canadian Human Rights Act*⁷ and not provincial human rights laws.

3. Drug or Alcohol Dependency and Abuse as a Disability⁸

Section 5(1) of the *Code* prohibits discrimination in employment on several grounds, including "handicap" (the *Code* uses the term "handicap" but the more currently accepted term is "disability" and it is therefore used in this and other Commission documents). The *Code* adopts an expansive definition of the term "handicap", which encompasses physical, psychological and mental conditions. Severe substance abuse is classified as a form of substance dependence,⁹ which has been recognized as a form of disability. Examples include alcoholism and the abuse of legal drugs (e.g. over-the-counter drugs) or illicit drugs. These types of abuse and dependence therefore constitute a disability within the meaning of the *Code*.

The following examples represent situations in which the use of legal or illicit drugs or alcohol may fall within the *Code*:¹⁰

- (a) where an individual's use of drugs or alcohol has reached the stage that it constitutes severe substance abuse, addiction, or dependency, e.g. maladaptive patterns of substance use leading to significant impairment or distress, including:
 - (i) recurrent substance abuse resulting in a failure to fulfil major obligations at work;
 - (ii) recurrent substance abuse in situations which are physically hazardous;
 - (iii) continued substance abuse despite persistent social, legal or interpersonal problems caused or aggravated by the effects of the substance.¹¹

- (b) Here an individual is *perceived* as having an addiction or dependency due to drug or alcohol use, the *Code* will protect that individual.

Example: An employer refuses to promote a particular employee because of the perception that the employee has an alcohol dependency. As a result of this perception and consequent action on the part of the employer, the individual's right to equal treatment under the *Code* may have been infringed.

- (c) An individual who has had a drug or alcohol dependency in the past, but who no longer suffers from an ongoing disability, is still protected by the *Code*.

4. Drug and Alcohol Testing: Direct or Constructive Discrimination?

Although the *Code* distinguishes between direct and constructive discrimination,¹² the distinction is less important than it used to be, particularly in the area of disability. This is a result of the combined impact of two factors. First, the Supreme Court of Canada has blurred the distinction between the two for practical purposes and has developed a single three-step test.¹³ The Ontario Court of Appeal has applied similar reasoning in the Ontario context, specifically in the area of disability and drug and alcohol testing.¹⁴

Second, section 17 of the *Code* provides a defence where a person with a disability is unable to perform an essential requirement. However, the defence is only available if the requirement is *bona fide* and reasonable, and only after the person has been accommodated to the point of undue hardship. Since employers usually argue that the requirement for impairment-free performance is essential, section 17 of the *Code* will be an important part of a respondent's defence.

In either event, the Ontario Court of Appeal has indicated that except in the most obvious cases of direct discrimination, the focus should be on determining whether the employer can justify the policy or standard using the new three-step test set out by the Supreme Court of Canada.¹⁵ Applying this approach, company-wide policies such as drug and alcohol testing policies will attract the need to accommodate employees and, most importantly, on an individual basis.¹⁶ The Commission supports this position. Individualisation is central to the notion of dignity for persons with disabilities and to the concept of accommodation on the ground of disability, regardless of whether a particular form of drug testing or alcohol testing is likely to be considered to be "direct" or "constructive".¹⁷ "Blanket" rules that make no allowances for

individual circumstances are necessarily unable to meet individual requirements and are therefore likely to be struck down.

5. Drug and Alcohol Testing: Basic Principles

Drug and alcohol testing is *prima facie* discriminatory under Canadian human rights law.

Employers can nevertheless justify discriminatory rules if they can meet a three-part test:¹⁸

- the employer has adopted the standard or test for a purpose that is rationally connected to the performance of the job;
- the employer adopted the particular standard or test in an honest and good-faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- the standard or test is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Drug and alcohol testing policies are part of workplace rules and standards. Therefore, standards governing the performance of work should be inclusive. Employers must build conceptions of equality into workplace policies.

Drug and alcohol testing should be limited to determining actual impairment of an employee's ability to perform or fulfil the essential duties or requirements of the job. It should not be directed towards simply identifying the presence of drugs or alcohol in the body.

Drug and alcohol testing that has no demonstrable relationship to job safety and performance has been found to be a violation of employee rights.¹⁹ A relationship or rational connection between drug or alcohol testing and job performance is an important component of any lawful drug or alcohol testing policy. In this regard, the policy must not be arbitrary in terms of which groups of employees are subject to testing. For example, to test only new or returning employees but not other employees may not be justifiable, having regard to the stated objectives of a company's testing policy. At the same time, testing employees in safety-sensitive positions only may be justifiable.

Applying the three-part test to drug and alcohol testing, the following questions should be considered by employers, where applicable:

- (i) Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
- (ii) In respect of a specific employee, is there an objective basis for believing that unscheduled or recurring absences from work, or habitual lateness to work, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency? These factors could demonstrate a basis for "for cause" or "post incident" testing provided there is a reasonable basis for the conclusions drawn.
- (iii) Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by alcohol or drug abuse or dependency will adversely affect the safety of co-workers or members of the public?

6. Pre-Employment Testing for Drug and Alcohol Use as Part of an Employment-Related Medical Examination

Testing for alcohol or drug use is a form of medical examination. Therefore, an employer considering such testing should be guided by the three-part test cited above, by the Commission's *Policy on Employment-Related Medical Information*²⁰ and by the Ontario Court of Appeal's recent decision in the *Entrop* case. The following are the main principles that should be borne in mind:

- (i) Employment-related medical examinations or inquiries, conducted as part of the applicant screening process, are prohibited under Section 23(2) of the *Code*.
- (ii) Pre-employment medical examinations or inquiries at the interview stage should be limited to determining an individual's ability to perform the essential duties of a job.
- (iii) In order to implement a testing program prior to hiring, the employer must therefore be able to demonstrate that pre-employment testing provides an effective assessment of the applicant. Since drug testing cannot be shown to actually measure impairment, pre-employment drug testing should not be conducted. Although there has been no clear indication from the courts, it is the Commission's view that, in the absence of clear medical research, pre-employment alcohol testing does not appear to predict an employee's ability to perform the essential requirements of a safety-sensitive

position. All it can do is assess impairment *before* the person is actually on the job. It is therefore difficult to see how an employer could justify pre-employment alcohol testing.

- (iv) Medical examinations to determine an individual's ability to perform the essential duties of a job should only be administered after a conditional offer of employment has been made, preferably in writing.
- (v) Where drug or alcohol testing will be a valid requirement on the job, the employer should notify job applicants of the requirement at the time that an offer of employment is made. The circumstances under which such testing might be required should be made clear to the applicant.
- (vi) If the applicant or employee requests accommodation in order to enable him or her to perform the essential duties of the job, the employer is required to provide individual accommodation unless it is impossible to do so without causing undue hardship.

7. On-the-Job Testing

On-the-job testing should be administered only where a link has been established between impairment and performance of job functions, such as in the case of employees who are in safety-sensitive positions. Once again, because drug tests do not actually measure impairment, random drug testing is an unjustifiable intrusion into the rights of employees. With respect to random alcohol testing, the use of breathalysers is a minimally intrusive yet highly accurate measure of both consumption and actual impairment. Consequently, the Commission supports the view that random alcohol testing is *acceptable in safety-sensitive positions, especially where the supervision of staff is minimal or non-existent, but only if the employer meets its duty to accommodate the needs of those who test positive* (see below).

"For cause" and "post incident" testing for either alcohol or drugs may be acceptable in specific circumstances. Following accidents or reports of dangerous behaviour, for example, an employer will have a legitimate interest in assessing whether the employee in question had consumed substances that are psychoactive and which may have contributed to the incident. The results of the assessment may provide an explanation of the cause of the accident. Such testing should only be conducted as part of a larger assessment of drug or alcohol abuse. This larger assessment could include a broader medical assessment under a physician's care, where there are reasonable grounds to believe that there is an underlying problem of substance abuse. Additional

components of a larger assessment may include employee assistance programs ("EAPs"), peer reviews and supervisory reviews.

Employers should also have regard to the following criteria and considerations when developing on-the-job testing criteria:

7.1 Competent Handling of Test Samples

Qualified professionals must perform drug and alcohol testing and the results must be analysed in a competent laboratory. Further, it is the responsibility of the employer to ensure that the samples taken are properly labelled and protected at all times.

7.2 Confidentiality of Test Results

In order to protect the confidentiality of test results, all health-assessment information should remain exclusively with the examining physician and away from the employee's personnel file.

7.3 Review of Results with the Employee

Procedures should be instituted for the physician to review the test results with the employee concerned.

7.4 Mandatory Self-Disclosure

Where mandatory self-disclosure is a part of a workplace drug or alcohol policy, there must be a reasonable time period within which previous substance abuse will be considered relevant to assessment of current ability to perform the essential duties. The reasonable time period is based on whether the risk of relapse or recurrence is greater than the risk that a member of the general population will suffer a substance abuse problem. Mandatory self-disclosure of all previous substance dependencies, without any reasonable limitation on how long ago these conditions occurred, has been found to be a *prima facie* violation of employee rights.²¹

7.5 Alternative Methods

The Commission supports the use of methods other than drug and alcohol testing (e.g. functional performance testing) where such methods exist, or the development of such tests, where feasible, to assess impairment. The Commission also encourages the development and implementation of EAPs and peer monitoring.

8. Consequences of a Positive Test

Section 17 of the *Code* requires individualized or personalized accommodation measures. Therefore, policies that result in automatic loss of employment, reassignment or that impose inflexible reinstatement conditions, without regard for personal and individual circumstances, are unlikely to meet this requirement.²²

Although the emphasis in the *Code* is on ensuring that persons with disabilities are not treated in a discriminatory manner because of their disability, it is recognized that in some circumstances, the nature and/or degree of a person's disability may preclude that individual from performing the essential duties of a job. Section 17(1) of the *Code* states that the right to equal treatment in respect of employment is not infringed where an individual is treated differently because she or he is incapable of performing or fulfilling the essential duties of the position because of a disability. Assessment of incapacity must be both fair and accurate.

9. Duty to Accommodate

9.1 Section 17(2)

Section 17(2) provides that an employee shall not be found incapable of performing the essential duties of a job unless it would cause undue hardship to accommodate the individual employee's needs, taking into account the cost of the accommodation and health and safety concerns.

Sections 17(1) and 17(2) provide a two-stage test for the validity of a workplace drug and alcohol testing policy.

Example: An employer is concerned about fairness and decides to extend an existing alcohol-testing policy, originally designed for employees in safety-sensitive positions, to cover all other employees. Although the policy's generous rehabilitation programs may satisfy the accommodation requirement set out in Section 17(2), this defence is not available to the employer unless it can be shown that employees in non-safety-sensitive positions who fail the test are incapable of performing their essential duties.

9.2 Onus on the Employee to Co-operate with the Employer

A person who requires accommodation in order to perform the essential duties of a job has a responsibility to communicate the need for accommodation in sufficient detail and to co-operate in consultations to enable the person responsible for accommodation to respond to the request. It should be noted

that this obligation does not interfere with the employer's obligation to treat the person equally even if the employer believes or perceives (even with good reason) that the employee has a substance-abuse problem.

Example: An employee in a clerical position appears to be inebriated frequently during work hours, and the employer has a conversation to address the problem. The employee refuses to acknowledge the problem or seek counselling at the employer's expense. Shortly after, the employee is fired without formal warning.

In this case, the employer clearly "perceived" the person to have a substance-abuse problem and therefore the protection of the *Code* is engaged. The fact that a person refuses treatment or accommodation does not in and of itself justify immediate dismissal. The employer has to demonstrate, through progressive discipline, that the employee has been warned and is unable to perform the essential duties of the position. If the employee refuses offered accommodation and if progressive discipline and performance management have been implemented, then disciplinary steps can be taken.

If an employee's drug or alcohol addiction/dependency is interfering with that person's ability to perform the essential duties of the job, the employer must first provide the support necessary to enable that person to undertake a rehabilitation program, unless it can be shown that such accommodation would cause undue hardship.

9.3 Undue Hardship

The employer will be relieved of the duty to accommodate the individual needs of the alcohol or drug addicted/dependent employee if the employer can show, for example, that:

- (i) the cost of the accommodation would alter the nature or affect the viability of the enterprise; or
- (ii) notwithstanding accommodation efforts, health or safety risks to workers or members of the public are so serious that they outweigh the benefits of providing equal treatment to the worker with an addiction or dependency.

9.4 Alternative Mechanisms

The Commission supports the use of the least intrusive means of assessing impairment or fitness for work. All workplaces should consider

using comprehensive workplace health policies that may include such programs as EAPs and drug education and health promotion programs.

When considering how best to address the needs of employees with substance dependencies, employers are encouraged to consider the establishment of alternatives such as EAPs. EAPs are personal assistance programs that help employees who have substance abuse or other problems. Such programs can assist not only individuals with a drug or alcohol addiction/dependency, but can also help workers deal with the stress which may lead to such an addiction or dependency. Off-site counselling and referral services are examples of EAPs that are used successfully in the workplace. In addition, health promotion and drug education programs can prevent problems before they start, by getting at the causes. Other alternative mechanisms include performance tests for safety-sensitive positions, where physical and/or mental coordination are integral parts of the job, and peer or supervisory monitoring.

10. For Further Information

The Addiction Research Foundation (ARF) has prepared a best practices guide entitled *Workplace Testing: Where to Draw the Line*. The ARF also provides audio-visual and written materials to help employers and others to understand drug and alcohol testing and to develop alternative mechanisms. Contact the ARF's Information Centre at 416-595-6111 or toll free at 1-800-463-6273.

11. Relevant Ontario *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 5, 10(1), 17(1)(2), 23(2), and 11(1)(2).

ENDNOTES

- ¹ See *Drug and Alcohol Testing in the Workplace*, Report of the ILO Tripartite Experts Meeting (May 1993, Oslo, Norway), cited in Butler *et al.*, *The Drug Testing Controversy: Imperial Oil and Other Lessons* (Carswell, Toronto: 1997) at 5.
- ² As distinct from deterrent value, for which there is no reliable study showing successful outcomes, or for the purposes of monitoring moral values among employees.
- ³ Most employers who are subject to U.S. commercial motor vehicle regulations are likely to be under federal jurisdiction under the *Canadian Human Rights Act*. However, even provincially regulated companies that may have only the occasional driver seeking to enter the U.S. are also subject to regulatory requirements for drug and alcohol testing in order to enter the U.S.
- ⁴ There are five social areas covered in the *Code*. These are employment, accommodation (housing), goods services and facilities, membership in vocational associations and contracts.
- ⁵ Letter from Chief Commissioner Keith C. Norton to the Hon. John Baird, Minister of Community and Social Services (unpublished, July 1999). The Commission expressed concern about the Government's announced plans to test welfare recipients for drugs or alcohol.
- ⁶ Section 91 of the *Constitution Act, 1867*.
- ⁷ R.S.C. 1985, c. H-6.
- ⁸ "Handicap" is the term used in the *Code*, but "disability" is the more appropriate term. "Disability" is therefore used in Commission documents except where specific reference to the *Code* requires use of the word "handicap."
- ⁹ "Drug abuse and drug dependence are diseases, illnesses, malfunctions and mental disorders, which can create mental impairment and result in mental disorder and physical disability". *Entrop v. Imperial Oil Ltd.*, Interim Decision #8 Sept. 12, 1996, Decision No. 96-030-I. This aspect of the ruling was not challenged on appeal to the Court of Appeal. See *Entrop, infra* at note 14.
- ¹⁰ *Ibid.*
- ¹¹ Adapted from the definition of "substance abuse" in the *Diagnostics and Statistical Manual of Mental Disorders* (American Psychiatric Association, 4th ed., 1994) cited in *Entrop* #8, *supra* note 9.
- ¹² See, e.g. ss. 5 and 11 of the *Code*.
- ¹³ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, (1999) 176 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Meiorin*].
- ¹⁴ *Entrop v. Imperial Oil Ltd.* (unreported decision of the Ontario Court of Appeal, 21 July 2000).
- ¹⁵ *Ibid.* at para. 79-82.
- ¹⁶ *Ibid.*
- ¹⁷ See generally the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*, in Ontario Human Rights Commission, *Human Rights Policy in Ontario* (Queen's Printer, Toronto: 1999).
- ¹⁸ See *Entrop, supra* note 14, citing *Meiorin, supra* note 13.
- ¹⁹ See *Entrop, supra* note 14.

²⁰ A copy of the Ontario Human Rights Commission *Policy on Employment-Related Medical Information* (1996) is available on the Web at www.ohrc.on.ca and printed in *Human Rights Policy in Ontario*.

²¹ *Entrop*, *supra* note 14.

²² *Ibid.*

POLICY ON EMPLOYMENT-RELATED MEDICAL INFORMATION

Approved by the Commission: June 19, 1996

POLICY ON EMPLOYMENT-RELATED MEDICAL INFORMATION

1. Introduction

The Ontario *Human Rights Code* (the "*Code*"), states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

The guidelines contained in this policy are intended to help applicants, employees and employers to understand their rights and responsibilities regarding employment-related medical information.

2 Employment Applications

In the past, employers often screened out applicants with disabilities based on medical information requested on application forms or obtained through pre-employment medical examinations. The Commission believes that such questions, asked as part of the application screening process, violate section 23(2) of the *Code*.

Any medical assessment to verify or determine an individual's ability to perform the essential duties of a job, should only take place after a conditional offer of employment is made, preferably in writing. This allows an applicant with a disability the right to be considered exclusively on her or his merits during the selection process.

The Commission recognizes the fact that it would be advantageous to both the employer and prospective job applicants if the employer were to disclose information on any specific medically-related requirements of a position at an early stage of the recruitment process.

Example: A Police Services Board may stipulate in a recruitment advertisement that applicants must meet a minimum vision standard without corrective lenses to qualify for selection.

3. The Personal Interview

The prohibition contained in section 23(1) of the *Code* is qualified by section 23(3), which allows an employer to ask at a personal interview whether an applicant has any disability-related needs that would require accommodation to enable her or him to do the essential duties of the job. The duty to provide such accommodation is discussed in more detail in the following section.

It is not unusual for an employer to ask about, or for a job applicant or an employee to volunteer information about her/his specific medical condition. However, an employer or supervisor may be placed in a vulnerable position if he or she directly receives any information about the particular medical condition of an applicant or employee. This information leaves the way open for an allegation to be made that subsequent decisions relating to the hiring of the applicant, or the promotion or termination of the employee were based on that information.

It is the view of the Commission that to protect the employer from allegations of discrimination, as well as the applicant or employee, medical-related information should remain exclusively with the examining physician and away from an employee's personnel file.

4. Duty to Accommodate

In some circumstances, the nature or degree of a person's disability may preclude that individual from performing the essential duties of a job. Section 17(1) provides that the right to equal treatment in employment is not infringed if the individual *is incapable of performing or fulfilling the essential duties* of the position because of a handicap.

However, section 17(2) provides that a job applicant or employee shall not be found incapable of performing the essential duties of a job, unless it can be demonstrated that it would cause undue hardship to accommodate her or his needs. The standard of undue hardship considers the cost of the required accommodation and any health and safety concerns that may be

involved. (See further the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.

A person who requires accommodation in order to perform the essential duties of a job has a responsibility to communicate her or his needs in sufficient detail and to cooperate in consultations to enable the person responsible for accommodation to respond to the request.

The duty to provide accommodation extends to all facets of the employment process: hiring, employment testing, on-the-job training, working conditions, transfer, promotions, etc.

5. Relevant Ontario *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 17(1)(2) and 23(1)(2)(3).

POLICY ON FEMALE GENITAL MUTILATION (FGM)

Approved by the Commission: April 9, 1996

Revised: November 22, 2000

POLICY ON FEMALE GENITAL MUTILATION (FGM)

1. Overview

Female genital mutilation ("FGM") refers to the cutting and removal of the female genitalia. FGM is a traditional practice rooted in the political, social, cultural and economic structures of the societies in which it is practised.

FGM is a gender-specific violation of the rights of girls and women to physical integrity.¹ This traditional practice is conducted in many cultures and in many countries. FGM has become recognized not only as a health hazard and a form of violence against women and girls, but also as a human rights issue under international law. Efforts at the international level, particularly by United Nations agencies, have placed FGM on women's health and human rights agendas.

For most Canadians, FGM is a vaguely understood practice usually associated with "distant" and "tradition bound" cultures. Most people know very little about what is involved in the procedure or about the health and sociological implications for the women and girls who are subjected to it.

The Ontario Human Rights Commission (the "Commission") acknowledges that FGM is an internationally recognized violation against women and girls' human rights. The Commission has developed this policy to ensure the effective protection and promotion of human rights of women and girls.

The purpose of this document is to outline the policy position of the Ontario Human Rights Commission with respect to the practice of FGM. This position has been developed within the framework of:

- (i) female genital mutilation as an internationally recognized human rights issue;
- (ii) the domestic implications of Canada's obligations as a signatory to international conventions and treaties which recognize FGM as a human rights violation; and
- (iii) the mandate and jurisdiction of the Ontario Human Rights Commission under the Ontario *Human Rights Code* (the "Code").

2. What is Female Genital Mutilation (FGM)?

2.1 The Practice of FGM

In 1991, the term "Female Genital Mutilation" was adopted at the Inter-African Committee Regional Conference on Traditional Practices Affecting the Health of Women and Children held in Burkina-Faso.² Female genital mutilation (FGM) is the collective term given to several different procedures that involve the cutting of female genitalia and permanently mutilating the sexual organs of young females for non-medical reasons. For the purpose of this paper, FGM refers to the ritualistic or traditional practices involving the cutting and removal of the female sexual organs.

Over centuries, FGM has been conducted as a ritual intended to prepare a girl for womanhood. Most commonly, girls are subjected to FGM between the ages of four and eight.

The practice is common in certain traditional Islamic communities, although some religious experts note that there is no religious basis in the Quran for the practice.³ While it is true that the practice has its roots in some countries in Africa, the Arabian Peninsula, Asia and South America, global migration patterns have brought the practice to Canada.

Women and girls who undergo FGM routinely experience pain, physical and emotional trauma and health complications as a result of infection to their genitalia and other reproductive organs. In some cases, severe bleeding and infection result in chronic disability or even death.⁴ Substantial psychological effects on the self-image and sexual lives of women are also a documented consequence of the practice. The most severe form of FGM, infibulation, which involves removal of the clitoris, results in trauma that is repeated after each childbirth.

Since the sole function of the clitoris is sexual stimulation, the main purpose of the practice is to control female sexuality, ensure chastity until marriage and to render young women more desirable for marriage purposes. Background information for this document, derived from the Commission's participation on the Ontario Female Genital Mutilation Prevention Task Force, lists a number of reasons for the practice, including: (a) preservation of virginity; (b) control over women's sexuality; (c) cosmetic reasons; (d) class distinction; and (e) cultural identity. "Hygienic" reasons have also been cited for continuing the practice.

In 1996, the World Health Organization estimated that between 100 and 132 million girls and women have been mutilated, and approximately 2 million girls and young women are at risk globally.⁵ Because of the nature of FGM, reliable statistics on the incidence of the practice here in Canada are

not available. However, there is sufficient information obtained through discussions with members of at-risk communities to indicate that there is a significant population of women in Ontario and other provinces in Canada who have been subjected to the practice, and whose girl children may be at risk. Although the practice is often referred to as “female circumcision”, the term belies the severity of what is actually involved.

2.2 Degrees of FGM

FGM includes any or all of the following: the removal of the hood of the clitoris; the complete removal of the clitoris along with labia minora excisions; the complete removal of the clitoris and surrounding tissues, and suturing of the vaginal opening (infibulation). An opening as small as 3 – 4 millimetres or as large as 1.8 centimetres is maintained to permit urination, menstruation and intercourse. The instruments that are often used include scissors, shards of glass, cactus spines or other rigid plant materials, and razor blades. In most instances it is performed outside of proper health-care facilities, and without anaesthesia.⁶

FGM can be broadly classified into the following two categories:

Clitoridectomy (sometimes known as “Sunna circumcision”⁷): In this set of operations, one or more parts of the external genitals are removed. The prepuce, or hood of the clitoris, is cut and there is partial or complete removal of the clitoris. Approximately 85% of all women who undergo FGM have clitoridectomies.

Infibulation (“Pharaonic mutilation”): This is the most severe FGM procedure and it is practised widely in countries in the Horn of Africa. The clitoris is removed, some or all of the labia minora are cut off and incisions are made in the labia majora to create raw surfaces. The raw surfaces are either stitched together, or kept in contact by pressure until they heal as a “hood of skin” which covers the urethra and most of the vagina, leaving only a very small opening. This obstruction may lead to urinary and menstrual-flow retention, dysmenorrhoea, and infections of the reproductive and urinary systems. An estimated 15% of all women who experience FGM have been infibulated. In some countries, however, 80 to 90% of all FGM cases involve infibulation.⁸

2.3 FGM and Male Circumcision

FGM is often referred to as “female circumcision”. This term implies a comparable practice to male circumcision. However, the degree of excision and trauma involved in FGM is generally much more extensive, including the actual removal of genital organs.

Male circumcision involves excision of the foreskin from the tip of the penis. The Canadian Paediatric Society conducted a literature review and concluded that "the overall evidence of the benefits and harms of male circumcision is so evenly balanced" that "the benefits have not been shown to clearly outweigh the risks and costs" and that male "circumcision for newborns should not be routinely performed".⁹ The Canadian Paediatric Society advises that when parents are making a decision about circumcision, they should be informed with respect to the present state of medical knowledge about its reported benefits and risks.

3. FGM: An Internationally Recognized Human Rights Issue

3.1 International Policy And Law

FGM has been condemned by numerous international and regional bodies, including the United Nations Commission on Human Rights, the United Nations International Children Emergency Fund (UNICEF), the Organization of African Unity, and the World Medical Association. In addition to the broader issues of health and human rights of the child, FGM is gender-specific discrimination related to the historical suppression and subjugation of women that is unique to women and female children.

In various African countries where the procedure is performed, comprehensive action plans were developed by women's groups to attempt to eliminate the practice, but overall, progress has been slow. FGM has been outlawed in Sudan since 1946, but it continues to be widely practised. In Burkina-Faso and Egypt, resolutions were signed by the respective Ministers of Health in 1959, recommending that only partial clitoridectomy be allowed, and decreeing that it be performed only by doctors. In 1978, as a direct result of the efforts of the Somali women's movement, Somalia established a Commission to abolish infibulation.

The issue of FGM was raised at the United Nations for the first time in 1952. However, it took some twenty years before the United Nations began official discussion of the issue. It was not until the 1970's, at the instigation of non-governmental organizations, that United Nations agencies were pushed to address the multitude of problems related to the practice. In July, 1980, the World Conference of the United Nations' Decade for Women was held in Copenhagen on the sub-themes of health, education and employment. In 1984, participants from twenty African countries, as well as representatives of international organizations attending a seminar in Dakkar on "Traditional Practices Affecting the Health of Women and Children", recommended that

the practice be abolished. States acknowledged that there was a need to establish strong, on-going education programmes for meaningful progress towards elimination of the practice.

FGM was again addressed by the 1993 United Nations World Conference on Human Rights. A Conference declaration stated:

The World Conference supports all measures by the United Nations and its specialized agencies to ensure the effective protection and promotion of human rights of the girl-child. The World Conference urges States to repeal existing laws and regulations and remove customs and practices which discriminate against and cause harm to the girl-child.¹⁰

In 1995, the Platform for Action of the World Conference on Women in Beijing included a section on the girl child and urges governments, international organizations and nongovernmental groups to develop policies and programmes to eliminate all forms of discrimination against the girl child, including FGM.¹¹

Canada plays a prominent role in the international arena as a supporter and promoter of women's human rights. In 1995, at the 9th United Nations Congress on the "Prevention of Crime and the Treatment of Offenders", Canada introduced a resolution on the "Elimination of Violence Against Women" (Agenda Item 6: Cairo Egypt, April 29–May 8, 1995). The resolution, which was passed by the Congress, strongly urged States, *inter alia*, to take measures to:

... prevent, prohibit, eliminate and impose effective sanctions against rape or sexual assault, sex abuse and all practices harmful to women and girl children, including *female genital mutilation*. (Emphasis added.)

International conventions, covenants and declarations which Canada has signed recognize that human beings have the inherent right to life,¹² equality,¹³ freedom and security,¹⁴ the right not to suffer discrimination,¹⁵ the right to the best possible state of physical and mental health,¹⁶ and the right not to be subjected to torture or to cruel and degrading punishment or treatment.¹⁷

3.2 FGM and Gender Discrimination

FGM has implications for the human rights of women as directly reflected in several international instruments, including the United Nations Convention on the Elimination of All Forms of Discrimination against Women.

The United Nations Declaration on the Elimination of Violence Against Women defines "violence against women" as encompassing, *inter alia*, "female genital mutilation and other traditional practices harmful to women".¹⁸ In Europe, legislation prohibiting the practice of FGM exists in Sweden, France and Great Britain, where the procedure carries a penalty of imprisonment.

The legal obligation to eliminate all forms of discrimination against women is described as a "fundamental tenet of international human rights law".¹⁹ Sex is a prohibited ground of discrimination under the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social, and Cultural Rights*, and three regional human rights conventions: the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *American Convention on Human Rights* and the *African Charter on Human and People's Rights*. The most comprehensive instrument, the *Convention on the Elimination of All Forms of Discrimination against Women*,²⁰ constitutes an international "bill of rights" for women, and sets out an agenda for nations to take action to end discrimination based on sex.

Article 5 of the *Universal Declaration of Human Rights* provides that no one shall be subjected to torture, nor to cruel, inhuman or degrading treatment. However, many signatory countries continue to violate that article through tolerance of the practice of FGM. Renée Bridel, of the Fédération Internationale des Femmes de Carrières Juridiques, noted:

One cannot but consider Member States which tolerate these practices as infringing their obligations as assumed under the terms of the Charter [of the UN].²¹

3.3 FGM and the Rights of the Child

FGM is a violation of the rights of the child guaranteed in treaties adopted by the United Nations and the Organization of African Unity. The *Convention on the Rights of the Child* has direct implications for the human rights of the child. The *Convention* was adopted by the UN General Assembly in 1989 and ratified by Canada in 1990.

That *Convention* asserts that children should have the possibility to develop physically in a healthy and normal way, with adequate medical attention, and be protected from all forms of cruelty. The *Convention* establishes the rights of children to gender equality (Art. 2), to freedom from all forms of mental and physical violence and maltreatment (Art.19.1) and to the highest attainable standard of health (Art. 24.1). Article 24.3 of the *Convention* explicitly

requires States to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.

3.4 FGM and Health Rights

The physical and psychological health complications resulting from genital mutilation of women have been extensively documented. The partial or complete loss of sexual function constitutes a violation of a woman's right to physical integrity and mental health. Health rights are guaranteed by the *International Covenant on Economic, Social and Cultural Rights* (Art. 12), the *Convention on the Rights of the Child* (Art. 2.4) and the *African Charter on Human and People's Rights* (Art. 16). The equal right to health care is further guaranteed by the *Convention on the Elimination of All Forms of Discrimination against Women* (Art.12).

4. FGM in Canada

For some time now, Canada has experienced immigrant and refugee movements from countries in which FGM is commonly practised. In Toronto, community groups have estimated that there are 70,000 immigrants and refugees from Somalia and 10,000 from Nigeria, both of which are countries in which FGM is commonly practised.²² As already noted, because of the nature of FGM, reliable statistics on the incidence of its practice are not available. However, based on discussions with members of the communities that are at risk, there is some evidence to indicate that FGM is practised in Ontario and across Canada. There is also evidence that suggests that in some cases, families from those communities send their daughters out of Canada to have the operation performed.²³

There is a growing recognition of FGM as a violation of human rights. Immigrant and refugee movements, governments and advocacy organizations in Canada have acknowledged the need to deal with FGM as an internationally recognized health and human rights concern.

4.1 Domestic Implications of International Human Rights Law

Canada is a signatory to over twenty major international conventions and treaties. A significant number of these are based on fundamental human rights principles. Canada's commitment to the development and maintenance of fundamental human rights in the international community and in Canada is therefore a matter of law. Domestic or national courts are required to interpret implementing legislation in conformity with international convention insofar as the domestic legislation permits.²⁴ In Canada, like other

common law countries, the presumption that the State does not intend to breach its international obligations also applies to conventional law. States should implement international laws where there is no obvious inconsistency between the domestic law and the international law.

Canada's treaty obligations under international instruments can bind the domestic courts if:

- (i) international law is specifically incorporated in domestic legislation or is incorporated by necessary implication; and
- (ii) (ii) where such legislation is itself enacted by the legislature with jurisdiction over the subject matter of the treaty.²⁵

In 1976, Canada and the provinces acceded to the *International Covenant on Civil and Political Rights*. It has been argued that this and other instruments to which Canada is a party are incorporated into Canadian law by implication through the Canadian *Charter of Rights and Freedoms* (the "*Charter*").²⁶ The *Charter* is described as implementing legislation that is *supremely authoritative and binding on all Canadian tribunals and institutions*, with governing phrases that are derived from the principles and instruments of the international legal system.²⁷

In 1983, Chief Justice Dickson, in his dissenting opinion in *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at pages 348–50, positioned the role of international law in *Charter* litigation in the following way:

... Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretations.

Chief Justice Dickson reaffirmed this position in a majority decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. at page 1041, in which he reiterated the importance of Canada upholding its obligations under international treaties to protect rights enshrined therein. He noted that where legislation is interpreted with the same status as an international instrument, either under customary international law or under a treaty to which Canada is a State Party, the objective of the legislation should generally be indicative of a high degree of importance attached to the right at international law.

Because FGM is gender-specific discrimination, internationally condemned and proscribed in international instruments to which Canada is a

party, the Province of Ontario would be in compliance with its obligations by taking steps to eradicate this practice. Any such initiatives taken by the Government of Ontario would be reflected in reports to international bodies in compliance with international conventions to which Canada is a signatory.

4.2 Criminal Law

The *Criminal Code* of Canada continues to be used as a means to address the issue of FGM. For example, it can be used to control the transportation of female children outside the country for the purposes of obtaining FGM.²⁸ Canada has recognized fear of gender persecution as a ground for claiming refugee status since the early 1990s. In May 1994, the Immigration and Refugee Board granted refugee status to a woman whose 10-year-old daughter would have been subjected to FGM if she had been forced to return to her country of origin.²⁹

As a result of the growing recognition of FGM as a violation of human rights, in October 1994 the then Ministry of the Solicitor General and Correctional Services³⁰ issued a memorandum to all Chiefs of Police and the Commissioner of the Ontario Provincial Police, explaining that FGM is a criminal offence, and informing them of the investigative and charging procedures for offences related to FGM. The Ministry of the Attorney General also sent a memorandum to all Crown Attorneys on the prosecution of charges related to FGM.

In May 1997, the federal government amended the *Criminal Code* and included the performance of FGM as aggravated assault under section 268(3).³¹ Under the *Criminal Code*, any person who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.³² A parent who performs FGM on their child may be charged with aggravated assault. Where the parent does not commit the act but agrees to have it performed by another party, the parent can be convicted as a party to the offence under section 21(1) of the *Criminal Code*.³³

4.3 The Quebec Charter of Human Rights and Freedoms³⁴

In December 1994, the Quebec Commission released a paper in which it states that it considers FGM to be a practice that jeopardizes "the right of women to personal inviolability, equality and non-discrimination."³⁵ The Quebec Charter sets out that the obligation of each person is to respect the rights of others and "any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such

interference and compensation for the moral or material prejudice resulting therefrom.”³⁶

The report goes on to note that:

This type of (genital) mutilation is performed exclusively on women, and is *unquestionably a discriminatory interference* with their physical and mental inviolability. The Commission des droits de la personne would therefore have competence to investigate complaints of sexual mutilation and, with the consent of the victim, to take legal action for discriminatory violation of personal inviolability with a view to obtaining civil redress and having the person found guilty condemned to exemplary damages.³⁷ [Emphasis added]

The Quebec Commission took the position that it has the jurisdiction to investigate a complaint filed by a woman who has been subjected to FGM, and to institute both civil and criminal proceedings where investigation findings support the allegation that a woman's right has been violated as a result of FGM. The report concludes by indicating that preventative measures, via education and awareness-raising, must be given priority.

4.4 Ontario

4.4.1 FGM Prevention Task Force

In the early 1990s, an increasing number of women who had been subjected to FGM began seeking medical assistance.³⁸ The Canadian Centre for Victims of Torture, working with women from at-risk communities, family physicians, and the Department of Health, established the first mutual-support outreach group for women who had been subjected to FGM. Since then, a number of other initiatives have been developed.

As there were no co-ordinated efforts between various professionals and institutions, and no consistent policy in Canada regarding FGM, members of affected communities requested that the Minister Responsible for Women's Issues establish an Ontario FGM Prevention Task Force. The Task Force, an inter-ministerial/agency/community initiative, was mandated to develop and recommend strategies and policies designed to provide support for girls and women who have been subjected to FGM, to prevent the practice, and to support community work by and for women affected by genital mutilation.³⁹

4.4.2 FGM and the Duty to Report

In Ontario, a duty to report FGM exists under the policy of the College of Physicians and Surgeons of Ontario (CPSO) and under the *Child and Family Services Act*.

Under the CPSO policy, the performance of female circumcision, excision, infibulation and/or reinfibulation by a physician licensed in Ontario, unless medically indicated, would be regarded as professional misconduct.⁴⁰ The CPSO also requires that:

Any physician who becomes aware of a procedure of this nature being performed by another physician should, in accordance with the Code of Ethics, bring this information to the attention of the College at the earliest opportunity. Since the performance of circumcision, excision and/or infibulation on any female child by any person may constitute child abuse, the Children's Aid Society and appropriate police agencies must be notified.⁴¹

Under Ontario's *Child and Family Services Act*,⁴² there is a duty to report information with respect to a child who is in need of protection. This duty exists despite the provisions of any other Act. If a person has reasonable grounds to suspect that a child is or may be in need of protection (e.g., from physical harm such as FGM), the person is obliged to report the suspicion to appropriate authorities. The Ontario Association of Children's Aid Societies has a policy that supports the duty to report and the protection of the rights of children. In March 1992, the Ontario Association of Children's Aid Societies issued the following statement on FGM. The performance of female circumcision, excision or infibulation on a child meets the definition of child abuse in the *Child and Family Services Act* of 1984. The duty to report under this Act applies to all members of the public and those who perform professional or official duties with respect to children.⁴³

5. The Ontario Human Rights Code

The Ontario *Human Rights Code* recognizes the inherent worth and dignity of every person in Ontario. The Preamble makes particular reference to the *Universal Declaration of Human Rights* and the inherent principles of dignity and equal and inalienable rights of the person. The creation of a society in which all persons can live and work in an environment that is free from discrimination is central to the policy objectives of the Ontario Human Rights Commission in virtue of the *Code*. The Commission thus recognizes that FGM violates the basic human rights and human dignity of women and girl children.

In Ontario, evidence indicates that FGM is practised within certain immigrant groups.⁴⁴ There are new immigrants to Canada who may not be aware that some of their traditional or culturally rooted attitudes and values may result in practices that are clearly in conflict with Canadian law, including the Ontario *Human Rights Code*. The Ontario Children's Aid Society, in its Policy

on Female Genital Mutilation (April 1995) notes that most families who seek out this procedure do not consider the mutilation of female genitalia as a form of physical or sexual abuse. The Society also stresses the need to understand the socio-cultural context in the development of strategies to stop the practice.

The Commission recognizes the need for public sensitivity, awareness and understanding in dealing with culturally rooted practices which may conflict with the principles and provisions of the *Code*. At the same time, the Commission has a dual responsibility under its mandate to enforce the provisions of the *Code* and educate the public on human rights issues.

5.1 Interpretation

The practice of FGM in Canada raises human rights issues as well as health, social and criminal law concerns. The international community, including Canada, has condemned FGM as a human rights violation. This has implications for the *Code* with respect to matters within provincial jurisdiction.

The Commission acknowledges the complex social and cultural roots of FGM and the need for dialogue and education initiatives within the at-risk communities in Ontario and across Canada. However, it is the Commission's view that arguments based on a defence of cultural or religious values should not be accepted as justification for the practice, nor for discriminating against women who have been subjected to, or perceived to have been subjected to, genital mutilation.

The Commission has a responsibility to ensure that the fundamental human rights principles enshrined in the international conventions and treaties to which Canada is a signatory, and which are protected in the *Code*, are respected and upheld in Ontario.

It is the Commission's position that the practice of FGM is contrary to the *Criminal Code* and public policy in Ontario. The practice offends the inherent dignity of women and infringes their rights as set out in the Ontario *Human Rights Code*. The Commission will therefore, accept, investigate and make a determination on complaints involving FGM filed by victims of the practice or their legal guardian.

Under the *Code*, an allegation of discrimination must be based on a prohibited ground of discrimination in relation to an identified social area.

5.1.1 Primary Prohibited Ground: Sex

International law and human rights law in particular have identified FGM as a gender issue. A complaint filed with the Commission would most likely

fall under the prohibited ground of "sex". Genital mutilation is reported to be used as a means of social control over women in affected communities.⁴⁵ The Commission's *Policy on Sexual Harassment and Inappropriate Gender-Related Comment and Conduct* refers, at page 2, to the imbalance of power and authority as a policy consideration in reviewing behaviours that result in discrimination based on sex. The Policy reads in part:

... unequal treatment based on gender typically involves the abuse of male power and authority over women, resulting in the reinforcement of a woman's subordinate status in relation to the dominant male group.

5.1.2 Other Prohibited Grounds

Although the most likely prohibited ground of discrimination on which a complaint might be based is sex, particular facts relating to a specific complaint could also involve other prohibited grounds of discrimination. For example, the facts relating to a particular allegation of discrimination could lead to "place of origin" being cited as a ground in the complaint, if the alleged discriminatory treatment is clearly linked to FGM as a practice that only occurs in immigrant communities from specific countries.

"Handicap" or "perceived handicap" may be relevant in situations in which women who have been subjected to the procedure are treated differentially in respect of services or employment, subject to health considerations.⁴⁶

5.1.3 Social Areas

5.1.3(a) Services, Goods and Facilities (section 1):

Women who have been subjected to the procedure visit health-care practitioners who have rarely treated FGM patients. The *Code* protections may be applied to prevent discrimination against women (and girls, where applicable) who:

1. have undergone FGM, to ensure that they receive adequate and appropriate medical treatment without differential treatment, except as required for health reasons; or
2. refuse to be reinfibulated, but whose wishes are opposed by another family member.

The performance of FGM, including infibulation or reinfibulation by a physician licensed in Ontario, would also be regarded as professional mis-

conduct according to the CPSO's policy, and may give rise to criminal charges of assault.

5.1.3(b) Employment (section 5)

Women who have been subjected to FGM, or who may be perceived to have been subjected to FGM because of their creed or place of origin, may experience discrimination in employment. The Commission is aware through the Ontario FGM Prevention Task Force, that employment-related discrimination involving FGM and perceptions relating to the practice has occurred.⁴⁷

Discrimination may take the form of harassment by co-workers or management about the practice, or denial of employment because of the perception that women who have been subjected to FGM will have health complications resulting in high absenteeism rates.

6. Public Education

The Commission is mandated to undertake public education activities directed at promoting a greater understanding of human rights principles and voluntary compliance with the provisions of the *Code*.

The Commission recognizes the benefits to be gained towards the eradication of the practice of FGM through public education. Therefore, the Commission is committed to working with members and organizations of the at-risk communities, as well as with other agencies in the public sector, within the boundaries of its mandate and resources, in developing public education initiatives around FGM. The efforts of the Commission, together with those of the affected communities and concerned organizations, can help to create an environment in which people are encouraged to eradicate the practice, without imposing a threat to the dignity and cultural identity of the affected communities.⁴⁸

The Commission has prepared a pamphlet version of this policy in six languages, including French, Arabic, Somalian, Swahili, Amharic and English and in various formats: IBM compatible disk, audio tape and large print.

ENDNOTES

- ¹ Female genital mutilation involves the use of dangerous and frightening weapons, causes permanent physical damage and sometimes death, and is targeted in the most gender specific way possible at the female genitalia. Fitzpatrick, "International Norms and Violence Against Women" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives*, (Philadelphia: University of Pennsylvania Press, 1994) at 11.
- ² UN Doc. E/CN.4/Sub.2/1991/48 para. 136 (5)(1001).
- ³ See, Gloria Jacobs, *Female Genital Mutilation: A Call for Global Action* (New York: Women, Ink, 1993) at 5.
- ⁴ The physical effects on women and children include immediate complications such as haemorrhaging, acute infections, bleeding of adjacent organs and violent pain, and may sometimes lead to death. Later complications include so-called vicious or keloid scars which considerably shrink the genital apertures with attendant consequences; chronic infections which can lead to infertility; haematic complications (inability of menstrual blood to exit) and obstetric complications. Cutting and restitching performed on infibulated women can result in subsequent health risks. As well, psychological complications often develop, including functional psychiatric manifestations.
- ⁵ *Female Genital Mutilation: PREVALENCE AND DISTRIBUTION*, World Health Organization, August 1996, http://www.who.int/frhwhd/FGM/infopack/English/fgm_infopack.htm#PREVALENCE AND DISTRIBUTION, (8 December 2000).
- ⁶ See further *Working Group on Traditional Practices Affecting the Health of Women and Children*, Report of the UN Economic and Social Council, Commission on Human Rights, First Session, March 18–22, 1985; *Female Genital Mutilation: Information Kit*, Division of Family Health World Health Organization, Geneva, July 31, 1994; *Human Rights are Women's Rights* (London: Amnesty International), 1995.
- ⁷ "Sunna" refers to any practice required of Muslims. Yet, there are no direct references to FGM in the Quran and religious leaders generally remain silent on the practice. See further note 32.
- ⁸ Nahid Toubia, *Female Genital Mutilation* in Julie Peters and Andrea Wolper, eds., *Women's Rights Human Rights* (New York: Routledge, 1995) at 227.
- ⁹ Neonatal Circumcision Revisited. Fetus and Newborn Committee, Canadian Paediatric Society (CPS). Approved by the CPS Board of Directors in 1996, *Canadian Medical Association Journal* 1996; 154(6): 769-780. Reference No. FN96-01.
- ¹⁰ *Declaration and Program of Action adopted in Vienna on June 25, 1993, the World Conference on Human Rights*, quoted in *Human Rights Are Women's Rights* (London: Amnesty International, 1995) at 132.
- ¹¹ *Female Genital Mutilation: UNITED NATIONS ACTION*, World Health Organization, August 1996, <<http://www.who.int/frhwhd/FGM/infopack/English/fgminfopack.ht#PREVALENCE AND DISTRIBUTION>> (8 December 2000).
- ¹² *International Covenant on Civil and Political Rights*, Art.6; *International Convention on the Elimination of all Forms of Racial Discrimination*, Art. 2.
- ¹³ *International Covenant on Civil and Political Rights*, Art. 26.
- ¹⁴ *Universal Declaration of Human Rights*, Art. 3; *International Covenant on Civil and Political Rights*, Art. 9; *International Convention on the Elimination of all Forms of Racial Discrimination*, Art. 5(b).

- ¹⁵ *International Covenant on Civil and Political Rights*, Art. 26.
- ¹⁶ *International Covenant on Economic, Social and Cultural Rights*, Art. 12.
- ¹⁷ *Universal Declaration of Human Rights*, Art. 5; *International Covenant on Civil and Political Rights*, Art. 7; *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.
- ¹⁸ *Declaration of the United Nations General Assembly on the Elimination of Violence Against Women*, Plenary Session A/Res/48/104, December 20, 1993.
- ¹⁹ Cook, *Introduction: The Way Forward*, in Cook, ed., *supra*, note 1 at 10.
- ²⁰ Ratified by Canada on December 10, 1981; date of entry into force in Canada, was January 10, 1992.
- There are several provisions of the *Convention* which require States parties to take action against such practices as FGM, namely:
- (i) to take all appropriate measures, including legislation, to modify or abolish
 - (ii) existing laws, regulations, customs and practices which constitute discrimination against women (Art. 2.f);
 - (iii) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (Art. 5.a);
 - (iv) States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services including those related to family planning (Art. 12).
- ²¹ See E. Dorkenoo, *Female Genital Mutilation: Proposals for Change* (1992) *Minority Rights Group Report* at 16, Renée Bridel, *L'enfant Mutilé*, presented on behalf of the F.I.F.C.J. to the U.N., Geneva, 1978.
- ²² Omayma Gutbi, Preliminary Report on Female Genital Mutilation (FGM) (Ontario Violence Against Women Prevention Section of the Ontario Women's Directorate, 10 April 1995) [unpublished].
- ²³ *Ibid.* at 8.
- ²⁴ *Op. cit.* note 1, *General Approaches to Domestic Application of International Law*, Cook, ed., at 364.
- ²⁵ Maxwell Cohen and Ann F. Bayefsky, "The Canadian *Charter of Rights and Freedoms* and Public International Law" (1983) 61 *Canadian Bar Review* 265 at 288.
- ²⁶ *Ibid.* at 267. Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K), 1982, c.11 [1985, Appendix II, No. 44].
- ²⁷ *Ibid.*
- ²⁸ Section 273, *Criminal Code*, R.S.C. 1985, c. C-46, as am. S.C. 1993, c. 45, section 3, as am. S.C. 1997, c. 18, section 13.
- ²⁹ *Minister of Employment and Immigration v. Farah* (I.R.B. Toronto, Doc. 93-2198, May 10, 1994).

³⁰ In June 1999, the Ministry of the Solicitor General and Correctional Services was divided to form two ministries: the Ministry of the Solicitor General, and the Ministry of Correctional Services.

³¹ *Criminal Code*, R.S.C. 1985, c. C-46, section 268, as am. S.C. 1997, c. 16, s. 5:

(3) For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where (a) surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or (b) the person is at least eighteen years of age and there is no resulting bodily harm.

³² *Ibid.* s. 268 (2).

³³ *Ibid.* s. 21.

³⁴ R.S.Q., c. C-12. In Quebec, no social area is required to file a complaint. The Quebec Charter protects fundamental rights, political rights and judicial rights. FGM would be framed as a complaint under "the right to integrity" under fundamental rights. Note that under section 136 of the Quebec *Charter*, civil and criminal proceedings may be instituted by the Commission against any person who contravenes the Quebec *Charter*. To date, no complaints based on FGM have been filed.

³⁵ Maurice Drapeau and Hailou Wolde-Giorghis, *Sexual Mutilation: Unlawful Interference with Personal Inviolability* (The Quebec Commission des droits de la personne, December 21, 1994). Adopted in resolution COM-388-6.1.5. The Quebec *Charter of Human Rights and Freedoms*, section 1, "Every human being has a right to life, and to personal security, inviolability and freedom."

³⁶ *Ibid.*

³⁷ *Supra*, note 34 at 6.

³⁸ *Female Genital Mutilation Prevention/Eradication Strategies*, Draft Paper (Ontario FGM Prevention Task Force for Ontario Women's Directorate, Violence Against Women Prevention Unit, June 1995) at 4.

³⁹ *Ibid.*

⁴⁰ *The Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 85, as am. S.O. 1993, c. 37, s. 23.

⁴¹ The College of Physicians and Surgeons of Ontario, College Notice No.25 published in March 1992.

⁴² *The Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 72, as am. S.O. 1999, c. 2, ss. 22 (1), 38.

⁴³ The Ontario Association of Children's Aid Societies has a policy that supports the duty to report and the protection of the rights of children. In March 1992, the Ontario Association of Children's Aid Societies issued the following statement on FGM. The performance of female circumcision, excision or infibulation on a child meets the definition of child abuse in the *Child and Family Services Act of 1984*.

⁴⁴ *Supra*, note 21.

⁴⁵ *Ibid.*

⁴⁶ FGM would appear to fall under the ground of "handicap" under section 10. As previously noted, the health complications arising from FGM are many and can manifest themselves at different times.

⁴⁷ Such a situation involved an employment interview where, during the course of the interview, a human resources representative who was aware of the practice of FGM allegedly inquired as to the applicant's place of origin with a view to eliciting information about the applicant's long-term health as potentially unpredictable and her eventual reliability as an employee.

⁴⁸ At the June 1995 CASHRA (Canadian Association of Statutory Human Rights Agencies) Conference, the Commission tabled the following resolution which was unanimously passed:

INTERNATIONAL HUMAN RIGHTS AND THE PROTECTION OF WOMEN

WHEREAS Canada is a party to international instruments that provide for the respect and protection of the fundamental human rights of women and children; and

WHEREAS Canada is participating in an international initiative to eradicate the practice of female genital mutilation; and

WHEREAS Canadians are concerned that women and girls who are ordinarily resident in Canada are being subjected to the practice of female genital mutilation;

BE IT RESOLVED that CASHRA recommend to the Minister of Employment and Immigration that all prospective immigrants be provided with information setting out Canada's commitment to upholding international human rights instruments; emphasizing that the protection and respect of human rights is a cornerstone of Canadian society and extends to the protection of women and children against any acts which would cause grave interference with their personal inviolability, including female genital mutilation; and advising that practices such as female genital mutilation are deemed to be a criminal activity under the Canadian *Criminal Code*.

POLICY ON HEIGHT AND WEIGHT REQUIREMENTS

Approved by the Commission: June 19, 1996

POLICY ON HEIGHT AND WEIGHT REQUIREMENTS

1. Introduction

The Ontario *Human Rights Code* (the "*Code*") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Standards for height and weight are sometimes used to screen or evaluate job applicants. In the Commission's experience, this tends to occur in recruitment for occupations that traditionally have been male dominated. These standards or selection criteria are based on the average physical stature of men in the majority population group. Women and members of racial minority population groups are, on the average, physically smaller than members of the majority population group. Consequently, these groups tend to be disadvantaged by height and weight criteria.

The policy of the Ontario Human Rights Commission (the "Commission") with regard to such recruitment practices is set out below. This policy applies to all height and weight criteria used in the context of employment.

2. Background

Having two separate sets of height and weight criteria for men and women may reduce the discriminatory impact on women. However, individuals from racial minority groups who are on average of smaller build may still be excluded. For example, persons of Asian descent or persons belonging to indigenous population groups from Latin America are, on average, of smaller physical stature than the majority population group in Ontario.

3. Constructive Discrimination

Human rights complaints arising from the use of height and weight criteria tend to raise issues of constructive discrimination. Constructive or indirect discrimination is defined as a disadvantage or adverse impact that may result from the uniform application of a requirement, factor or rule. It is the Commission's opinion that height and weight criteria in employment, which on their face appear to be neutral, may in some circumstances contravene section 11 of the *Code*, which states:

- (1) A right of a person [under Part I] is infringed where a requirement, qualification or factor exists that is not discrimination on prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
 - (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances[.]

4. Height and Weight as *Bona Fide* Occupational Requirement

The test for determining whether an occupational requirement is *bona fide* was established by the Supreme Court of Canada in *Ontario (Human Rights Commission) v. Etobicoke (Borough)* [1982] 1 S.C.R. 202. The Court established that for a requirement to be considered as *bona fide*, two conditions must be met. First, there must be an objective relationship between the standards required and the job in question. Second, the standards must have been imposed in good faith.

Except in limited circumstances, there is little evidence to demonstrate that height and weight criteria are a *bona fide* occupational requirement, according to decisions from human rights tribunals in Ontario and other Canadian provinces.¹ Empirical research indicates that physical stature alone is not determinative of an individual's ability to perform the essential duties of a job, even if significant physical exertion is required. As a result, minimum standards for height and weight will not necessarily meet the reasonable and *bona fide* standard. If so, the defence provided by section 11(1) of the *Code* cannot be used to justify the requirement, qualification or factor.

5. Duty to Accommodate

It should be noted that section 11 of the *Code* states that a requirement, qualification or factor will not be considered to be a reasonable and *bona fide* requirement unless the employer has tried to accommodate persons who are adversely affected. If height and weight criteria are used to recruit for a particular job, the employer must attempt to accommodate women and members of ethnic or racial groups who are adversely affected by the requirement, qualification or factor. The employer can, however, demonstrate that such an attempt to accommodate these applicants would cause undue hardship² or would substantially change the essential nature of the job. In those circumstances, the employer is not required to provide accommodation.

6. The Commission's Position

The Commission urges employers who still use height and weight criteria in the employment recruitment process to discontinue the practice. However, if such criteria are maintained on the basis of demonstrated necessity for the performance of essential duties, accommodation of women and members of protected groups, short of undue hardship, is a requirement under the *Code*.

7. Relevant Ontario *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 5(1) and 11(1)(2)(3).

ENDNOTES

¹ *Colfer v. Ottawa Board of Commissioners of Police* (1979), unreported (Ont. Bd. of Inquiry); *Hartling v. Timmins (Municipality) Commissioners of Police* (1981), 2 C.H.R.R. D/487 (Ont. Bd. of Inquiry). See also *Lewington, Moran and Leuszler v. Vancouver Fire Department*, 6 C.H.R.R. D/2599 (B.C. Board of Inquiry).

² In assessing undue hardship, consideration will be given to the cost, any outside sources of funding and any health and safety requirements.

POLICY ON HIV/AIDS-RELATED DISCRIMINATION

Approved by the Commission: November 27, 1996

POLICY ON HIV/AIDS-RELATED DISCRIMINATION

A society is judged by how it responds to those in greatest need. A tragedy such as the HIV epidemic brings a society face to face with the core of its established values, and offers an opportunity for the reaffirmation of compassion, justice and dignity.

James D. Watkins, Chair Presidential Committee on the Human Immunodeficiency Virus Epidemic Report Report of June 24, 1988

1. Introduction

The Ontario *Human Rights Code* ("Code") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the Code are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

The *Code* provides for equal treatment without discrimination because of handicap. AIDS (Acquired Immunodeficiency Syndrome) and other medical conditions related to infection by the Human Immunodeficiency Virus (HIV) are recognized as handicaps within the meaning of the *Code*. All persons who have or have had, or who are believed to have or have had, or are perceived to have, AIDS or HIV-related medical conditions, including those who do not show symptoms of AIDS or AIDS-related illnesses, are entitled to the protection of the *Code* in employment, services, housing, contracts and membership in trade unions.

HIV is transmitted through very limited ways. It is most commonly transmitted through unprotected sexual activity and through contact with infected blood and other body fluids. A person may become infected with HIV by receiving blood transfusions or using blood-contaminated needles. It is important to recognize that today, the risk of transmitting HIV through blood transfusions has been minimized in North America. Since 1985, blood banks across

Canada and the United States have implemented routine procedures for comprehensive HIV antibody screening.

AIDS is much more than just a medical/scientific phenomenon. It challenges our fundamental values, such as a commitment to a compassionate society, to justice, and to the elimination of all aspects of discrimination that undermine these values.

2. Purpose of This Policy

This policy clarifies the scope of the *Code's* protection for persons who are or are perceived to be infected with HIV or who have contracted HIV-related illnesses. The guidelines contained in this policy are based on extensive consultations between the Commission and a wide-ranging number of interest and advocacy groups, employer groups, services providers, and members of the medical community, including hospital administrators.

3. Relevant Sections of the Code

3.1 AIDS as a Handicap (section 10)

The Commission recognizes that AIDS and other HIV-related medical conditions are handicaps under the *Code*. "Handicap" is defined under section 10 of the *Code*. All persons infected with HIV or with HIV-related illness, or who are believed to have the virus, including those who are asymptomatic, are fully protected against discrimination in services (section 1); housing (section 2); contracts (section 3); employment (section 5); and membership in trade unions (section 6).

Protection under the *Code* is also extended to persons on the ground of "sexual orientation." Persons identified by this prohibited ground of discrimination are often believed to be at high risk of contracting AIDS or to be carriers of HIV. The erroneous perception of AIDS as a "gay disease" is a form of stereotyping that the *Code* prohibits. Discrimination on the grounds of sexual orientation is unlawful.

3.2 Protection Against Discrimination and Harassment (section 10)

Persons who have or have had, or are believed to have or have had, AIDS or HIV-related medical conditions are protected from discrimination and har-

assment in employment, housing, services, contracts and membership in trade unions. Harassment is defined under section 10 of the *Code* and means:

engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

3.3 Discrimination because of Association (section 12)

The *Code* also protects against discrimination on the basis of "association." Section 12 of the *Code* states that:

A right under Part I (of the *Code*) is infringed where the discrimination is because of a relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

This means that a person who is associated with anyone who is identified by a prohibited ground of discrimination, such as a co-worker, a friend or a relative of the person who is HIV positive, cannot be discriminated against because of this association.

Example: A rental property manager would be in breach of the *Code* if she refuses to rent a house to a representative of an AIDS advocacy organization because of the organization's association with persons identified by their disability.

3.4 Duty to Accommodate

In addition to the specific grounds of prohibited discrimination mentioned above, s. 17 of the *Code* sets out a broad duty to accommodate the needs of persons with handicaps, short of undue hardship.

Example: An employer is obliged to accommodate the needs of a person with AIDS in order to assist the person in "performing or fulfilling the essential duties or requirements" of the job. This might involve taking steps to redefine work duties and providing temporary work assignments to accommodate health-related absences.

"Short of undue hardship" is a standard that is applied to the person required to make the accommodation. It takes into consideration costs, available sources of funding, as well as health and safety factors (see further the

Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*).

It is well established in human rights case law that customer or third-party preferences are not to be considered in assessing undue hardship.

Example: It is discriminatory for an employer to claim that customers and/or other employees would object to hiring a person who is HIV positive.

4. Application of the *Code*

This policy is intended to provide particular guidance to those responsible for formulating and implementing infection control procedures in health-care settings and anti-harassment discriminatory policies in the workplace, in housing and in services.

Keeping with the spirit of *Code*, any health protection and promotion policies should be introduced in a manner that respects the individual's privacy. Treating persons with HIV-related illness in an arbitrary or discriminatory manner that is not supported by current medical or scientific knowledge may be a violation of the *Code*.

4.1 Spirit of the *Code*

The spirit of the *Code* requires that persons who are HIV positive and those with HIV-related illness are to be given the opportunity to remain integral members of society and to maintain their social, employment and other relationships. This implies that any assessment of a person's illness must be based on his or her current abilities and on the situation's current risks, rather than on abilities or risks which may arise in the future. The *Code's* accommodation requirements are designed to ensure integration and sensitivity to the needs of persons with disabilities as they may change over time.

4.2 Respecting the Dignity of the Person

The *Code* prohibits, in all but exceptional circumstances, infection control techniques where the person with an HIV-related illness is isolated or quarantined. Current scientific knowledge on the transmission of the AIDS virus indicates that such measures do not prevent the spread of infection and are also inappropriate except in rare cases. Moreover, the fear of isolation may

simply deter persons who have participated in high-risk activities from seeking voluntary testing and counselling.

4.3 Universal Precautions

“Universal precautions” are a set of risk reduction measures employed at all times by medical and health-care professionals and workers whenever they encounter blood or other identified body fluids. The concept of universal precautions relates to the proper handling of sharp items, and the use of barriers, such as gloves and masks, to protect the person handling the blood or body fluids. It can be adapted to different medical settings depending on the medical procedure required.¹

Example: Dentists are expected to use the appropriate eye-wear, masks and gloves, etc., when dealing with all patients.

With universal blood and body-fluid precautions widely in place, there is no need for using additional precautions for patients who are known or believed to have illnesses that can be transferred by blood.

5. Testing

Testing for HIV infection would constitute a medical examination. It is the Commission's position that any medical examination carried out for employment purposes should focus on verifying whether or not an individual is able to perform the essential duties of a particular job.

Employers considering any form of employment-related medical testing should refer to the Commission's *Policy on Employment-Related Medical Information*.

The following are the main principles of that policy:

- (i) Employment-related medical examinations or inquiries, conducted as part of the applicant screening process, are prohibited under section 23(2) of the *Code*.
- (ii) Any employment-related medical examinations or inquiries are to be limited to determining the individual's ability to perform the essential duties of a job.
- (iii) Medical examinations, if determined to be necessary to assess an individual's ability to perform the essential duties of a job should only be undertaken after a conditional offer of employment has been made, preferably in writing.

- (iv) If the applicant or employee requires accommodation in order to enable him or her to perform the essential duties of the job, the employer is required to provide such accommodation unless to do so would cause undue hardship.

The *Policy on Employment-Related Medical Information* does not allow employers to subject job applicants to any type of medical examination before a conditional offer of employment is made. After the person is hired, medical tests designed to identify employees with disabilities may constitute a breach of the *Code* if the disability being tested for is not a reasonable and *bona fide* concern with regard to the job performed.

In most work settings, it is unlikely that testing for HIV infection or other protective measures would be necessary or justifiable. Several studies have conclusively demonstrated that persons with HIV infection or HIV-related medical conditions pose virtually no risk to those with whom they interact.²

The U.S. Public Health Service guidelines state that workers infected with HIV should not be restricted from using telephones, office equipment, toilets, eating facilities, or water fountains. There are no documented instances of HIV transmission from the serving or preparation of food or beverages. For non-sexual household contact, of 30,000 cases of AIDS reported to the U.S. Centre for Disease Control, none has occurred in family members of patients with AIDS, unless the members have partaken in other recognized risk-related behaviour.³

6. Ensuring Privacy and Confidentiality

It is essential to ensure the maximum degree of privacy and confidentiality when medical information is legitimately required for health protection and promotion or other purposes. This applies in all situations and circumstances, including hospitals, health clinics, insurance company records, employee's files, *etc.*

In employment settings, all health assessment information, including HIV testing results, should remain exclusively with the examining physician and away from an employee's personnel file in order to protect the confidentiality of the information.

7. The Role of the Commission

7.1 Remedies

The Commission has a broad statutory mandate, not only to provide a remedy when discrimination has taken place, but also to prevent it (see

section 29 of the *Code*). In seeking a remedy in situations where there is evidence to support allegations of discrimination, the Commission may, in addition to monetary compensation, seek remedies such as the following:

- (i) implementation of a formal institutional policy expressing a commitment to the equal treatment of persons who have, or have tested positive for, HIV infection;
- (ii) educational programs for others in the environment;
- (iii) other accommodation required by the person with HIV infection.

7.2 Priority Handling of Complaints Filed by Persons with HIV or HIV-related Illnesses

Once a person self-identifies as HIV positive, it is the Commission's policy to expedite HIV/AIDS-related discrimination complaints because of the shortened life expectancy of persons with HIV or HIV-related illnesses. The Commission may also use its authority to initiate complaints to address HIV/AIDS-related policies or actions that may be discriminatory when such information comes to the Commission's attention.

7.3 Preventing HIV/AIDS-related Discrimination

The most effective way to combat HIV/AIDS-related discrimination is through public education. The Commission is committed to working with community, public and private sector organizations in promoting greater understanding of the nature of HIV infection and HIV-related illness, and the rights of persons with AIDS or HIV-related illnesses to be free from discrimination.

8. Relevant Ontario *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 1, 2(1)(2), 3, 5(1)(2), 6, 10, 12, 17(1)(2), 23(1)(2) and 29.

ENDNOTES

¹ Royal College of Dental Surgeons of Ontario, *Guidelines Respecting Infection Control in the Dental Office*, June 1995. The College notes that its guidelines can be used by other health professional bodies in determining whether appropriate standards of practice and professional responsibilities have been maintained.

² The Canadian Medical Association released its policy on HIV in the workplace in May 1993, which includes the following statement:

There have been no instances in Canada of HIV infections in patients resulting from exposure to infected health care workers ... Health care workers with HIV infection should be afforded the opportunity to compete for jobs and continue to work at their usual occupation as long as they meet acceptable performance standards and are mentally and physically able to perform the essential components of work safely, efficiently and reliably.

³ *Biggs v. Hudson* (1988) 9 C.H.R.R. D/834 (B.C. Human Rights Council).

POLICY ON RACIAL SLURS AND HARASSMENT AND RACIAL JOKES

Approved by the Commission: June 19, 1996

POLICY ON RACIAL SLURS AND HARASSMENT AND RACIAL JOKES

1. Introduction

The Ontario *Human Rights Code* (the “*Code*”) states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Everyone has the right to live and work in an environment that is free of demeaning comments and actions when such behaviours are based on race, ancestry, place of origin, colour, or ethnic origin. Racial harassment through slurs, jokes or behaviour intended to demean a person because of his or her race, is discriminatory. Even when meant as a joke, racial comments are derogatory and may be humiliating.

This policy sets out the Commission's interpretation of the provisions of the *Code* relating to racial slurs, jokes and harassment. For the purpose of this document, and in the interest of brevity, the term “race” should be read to include all of the race-related grounds, *i.e.* race, ancestry, colour and ethnic origin. In some circumstances, citizenship, place of origin, and creed are linked to issues of racial discrimination and harassment.

2. Harassment

2.1 Employment

Section 5(2) of the *Code* provides that all employees have a right to freedom from harassment in the workplace by the employer, employer's agent, or by another employee because of, among other grounds, race, ancestry, place of origin, colour, ethnic origin, citizenship and creed.

2.2 Accommodation

Section 2(2) of the *Code* provides that every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of, among other grounds, race, ancestry, place of origin, colour, ethnic origin, citizenship and creed.

2.3 Services, Goods and Facilities

While the *Code* contains no explicit provisions dealing with harassment in the area of services, goods and facilities, it is the view of the Commission that harassment in such situations would constitute a violation of section 1, which provides for a right to equal treatment with respect to services, goods and facilities.

The following comments apply to discrimination and harassment which occur in all three of these areas: employment; accommodation; and services, goods and facilities.

2.4 General Principles

2.4.1 Code Definition

Harassment is defined in subsection 10(1) of the *Code* as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”.

The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” establishes an objective test for harassment.

- (i) In some situations it should be obvious that the racially-based conduct or comments will be offensive or unwelcome.
- (ii) Since the individual may be in a vulnerable situation, there is no requirement that the individual object to the behaviour in order for there to be a violation of the *Code*. It may be unrealistic to require an individual who is the target of harassment to object to the offensive treatment as a condition of being able to claim a right to be free from such treatment.

- (iii) Conduct or comments which are motivated by a person's race may not, on their face, be offensive. However, they may still be "unwelcome" from the perspective of a particular individual. If the individual objects and if a similar behaviour is repeated, it may constitute a violation of the *Code*.

Each situation that may be brought to the attention of the Commission through a human rights complaint will be assessed on its own merits. However, racial epithets, comments ridiculing individuals because of race-related characteristics, religious dress, *etc.*, or singling out an individual for humiliating or demeaning "teasing" or jokes related to race, ancestry, place of origin or ethnic origin, would in most instances be viewed as conduct or comments which "ought reasonably to be known to be unwelcome."

2.4.2 Comments or Conduct Need Not be Explicit

In order for the harassment provisions of the *Code* to apply, the comments or conduct need not be explicitly racial in order to constitute harassment based on race.

Example: A workplace is culturally diverse, but only the Asian employees are repeatedly made the brunt of practical jokes or ridicule. An inference *may* be drawn from the particular circumstances that the treatment was racially motivated, although the practical jokes or ridicule may not have contained any reference to race.

It is the Commission's position that some circumstances which may not come within the harassment provisions may nevertheless be covered by the *Code* under its general equality rights provisions.

Example: An employee was asked by the manager, "Why don't you go to school", and received differential treatment such as being arbitrarily disciplined, monitored during washroom breaks and on one occasion had his pay cheque thrown in his face. He said that all the Spanish-speaking staff were treated poorly.¹ While the manager did not explicitly make race-specific comments, singling out members of particular groups for differential treatment is a contravention of the *Code*.

3. Equality Rights: “Poisoned Environment”

Although a single instance of racial harassment or a single racial slur may not fall within the definition of harassment under the *Code*, it is the Commission’s view that there are circumstances in which the differential treatment need not occur continuously or repeatedly in order for there to be a violation of the *Code*.

Sections 1, 2, 3, 5 and 6 of the *Code* may provide the basis for a claim that a single incident or racially-based comment or conduct can create a “poisoned environment” for the persons affected.

A consequence of creating a “poisoned environment” is that certain individuals are subjected to terms and conditions of employment, tenancy, services, *etc.*, that are quite different from those experienced by individuals who are **not** subjected to these comments or conduct. In such instances, the right to equal treatment may have been violated.

3.1 Creating a “Poisoned Environment”²

Even though the statement may be made only once, the individual or members of the group singled out will legitimately have concerns about their long-term prospects in a workplace or rental unit. For example, other employees or tenants who are not members of that racial group will not experience the same concern and anxiety.

Examples of a situation which could be viewed as a violation of the *Code* by creating a “poisoned environment” include the following:

- (i) A supervisor or a landlord says to an employee or tenant who is a member of a racial minority community, “I don’t know why you people don’t go back to where you came from, because you sure don’t belong here”.
- (ii) Comments, signs, caricatures, or cartoons displayed in a service environment such as a store, restaurant, *etc.*, or in a work or tenancy situation show racial or religious groups *etc.*, in a demeaning manner may create a “poisoned environment” in violation of the *Code*.
- (iii) Graffiti which is tolerated by a service provider, employer, or landlord who does nothing to have the racial slurs removed may create a “poisoned environment”. Depending on the particular circumstances, some persons may be humiliated or may experience feelings of hurt, anger and resentment because of their race that are not experienced by others in that setting.

3.2 Further Examples of Creating a “Poisoned Environment”

The conduct at issue must be objectively evaluated. It must be of such a nature and degree so as to amount to a denial of equality through the creation of a “poisoned environment”.

- (i) Demeaning racial remarks, jokes or innuendo about an employee, client or customer, or tenant told to other employees, tenants, clients or customers may deny the right of those persons who are the subject of the comments to be viewed as equals.
- (ii) Racial remarks, jokes or innuendo made about other racial groups in the presence of an employee, tenant or client may create an apprehension on the part of members of other racial minority groups that they are also targeted when they are not present.
- (iii) The display of racist, derogatory or offensive pictures, graffiti or materials is humiliating and also impairs the right of those persons who are members of the targeted racial group to be viewed as equals.
- (iv) Racial remarks, jokes or innuendo do not only poison the environment for racial minority groups. They affect everyone's environment and are disruptive.

3.3 Comments or Actions Not Directed Toward an Individual³

3.3.1 *Not a Member of Targeted Group*

Members of a group protected under the *Code* who are not the specific targets of a discriminatory comment or action may nevertheless have a right to bring a complaint in circumstances similar to those described above. Exposure to a negative or hostile treatment that is racially motivated has a negative impact upon the sensibilities of an individual and is a human rights violation.

Example: A Chinese woman worked in a bakery where racial slurs and stereotypical language were common in the kitchen. Although none of these remarks were directed specifically to her but were directed to her black co-workers, a board of inquiry found that she had also been subjected to a racially- “poisoned environment”.⁴

3.3.2 *Because of Association*⁵

Persons who are not members of a particular group protected under the *Code*, but who are harassed because of their association with that group, may

also be in a position to file a complaint based on section 12 of the *Code*, which protects against “discrimination because of association”.

Example: A white tenant of an apartment was derided and ridiculed because of her friendship with a black person. Although the white person was not harassed based on her race, she was subject to harassment because of her relationship with someone identified by a prohibited ground of discrimination.

4. The Liability of Employers for the Actions of Their Employees/Agents⁶

4.1 Employer's Liability

4.1.1 *Common Law: The “Organic Theory” of Corporate Responsibility*

An employer may be liable for acts of harassment carried out by its employees. Where an employee is in a position of authority, the employer may be held responsible for the actions of that employee if it can be shown the employee was part of the management or “directing mind” of the organization. In such cases, the decisions and acts of the employee are so closely identified with the employer that they are treated as one and the same. That is, the acts or omissions of supervisors, managers, *etc.* are considered to be the acts of the employer, giving rise to corporate responsibility.

4.1.2 *Vicarious Liability*

The principle under the organic theory of corporate responsibility described above should be compared to the vicarious liability section of the *Code* (subsection 45(1)). Vicarious liability means that a corporation, union, trade or occupational association will be held responsible for breaches of the *Code* committed by employees or agents as though the corporation, union, trade or occupational association had committed the breaches themselves. This principle applies not only to employers, but also to providers of accommodation, such as building superintendents, and service providers. The doctrine of vicarious liability does not apply to harassment as defined in subsection 10(1)(f) of the *Code*. Rather, it applies to breaches of the equality rights provisions of the *Code*. (Please refer to “Equality Rights: Poisoned Environment” of this Policy.)

4.2 Board of Inquiry

4.2.1 Adding Parties

The Code authorizes the board of inquiry to add parties to a complaint at the hearing stage. Under subsection 39(2) the board of inquiry hearing a complaint of harassment can add as a party to the hearing any person who knew or should have known of the harassment. The decision to add a party is based on the information or facts available to the person if she or he failed to prevent the harassment or penalize the harasser although it was within her or his authority to do so.

4.2.2 Board Order (subsection 41(2))

If the board of inquiry finds that a party who knew or should have known about the harassment failed to exercise her or his authority to prevent or penalize the repetition of the harassment, it can order that party to take whatever steps are reasonable to prevent any further harassment.

4.2.3 Remain Seized of the Matter

The board of inquiry “remains seized of the matter” even after it makes an order. The result is that in the event the harassment continues, the board can then reconvene. After an order of the board prohibiting further harassment, the board retains control over the complaint; this is referred to as “remaining seized of the matter”.

4.3 Internal Anti-Harassment Policies

It is important that employers and those in the business of providing accommodation or services have policies that state clearly that any activity which results in harassment or creates a “poisoned environment” is prohibited in the context of the workplace. Employees, clients, customers, visitors, or tenants should know that it is against the law to harass anyone on racial grounds and that racial harassment will not be tolerated. The Commission has published guidelines entitled, *Guidelines for Developing Procedures to Resolve Human Rights Complaints Within Your Organization*.

Similarly, it is important that managers and supervisors be instructed to ensure that all staff are knowledgeable about the policy, and are able to deal promptly with any such incidents which come to their attention in a timely and effective manner.

5. Filing a Complaint

When a person believes that she or he has been subjected to racial slurs, harassment or jokes, the individual may contact the nearest office of the Ontario Human Rights Commission in order to obtain advice on how to deal with the situation or their rights under the *Code*.

The Commission has the discretion to refuse to deal with certain complaints where it feels that the matter 1) can be more appropriately dealt with under another provincial statute; 2) is trivial, frivolous, vexatious or made in bad faith; 3) is not within the Commission's jurisdiction; or 4) is based on facts which are more than six months old.

6. Collective Agreements and Company Policies

The Commission encourages unions to include in their collective agreements clauses protecting workers against discrimination and harassment. In addition to the rights available under the *Code*, a person may have rights that can be pursued under a collective agreement.⁷ Similarly, the Commission encourages companies to implement anti-discrimination policies for their employees.

7. Relevant *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 1, 2(1)(2), 3, 5(1)(2), 6, 39(2)(3), 41(1)(2) and 45(1)(2).

ENDNOTES

¹ *Espinoza v. Coldmatic Refrigeration of Canada Inc. et al.*, unreported (March 31, 1995) unreported, Hartman, R. (Ont. Bd. of Inquiry).

² *Wei Fu v. Ontario Government Protective Services* (1985), 3 C.H.R.R. D/742 (Ont. Bd. of Inquiry).

³ *Lee v. T.J. Applebee's Food Conglomeration* (1988), 9 C.H.R.R. D/4781 (Ont. Bd. of Inquiry).

⁴ *Ibid.*

⁵ *Jahn v. Johnstone* (Sept. 16, 1977), unreported, Eberts, M. (Ont. Bd. of Inquiry).

⁶ *Tabar v. Scott* (1984), 6 C.H.R.R. D/2471 (Ont. Bd. of Inquiry), reversed on other grounds (*sub nom. West End Construction Ltd. v. Ontario (Minister of Labour)*) (1986), 9 C.H.R.R. D/4537 (Ont. Div. Ct), which was reversed on other grounds (*sub nom. West End Construction Ltd. v. Ontario (Minister of Labour)*) (1989), 10 C.H.R.R. D/6491 (Ont. CA).

⁷ Bill 7 amended *Labour Relations Act* (section 48(11)(j)), to provide arbitrators or chairs with the power to:

interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.

POLICY ON REQUIRING A DRIVER'S LICENCE AS A CONDITION OF EMPLOYMENT

Approved by the Commission: June 19, 1996

POLICY ON REQUIRING A DRIVER'S LICENCE AS A CONDITION OF EMPLOYMENT

1. Introduction

The Ontario *Human Rights Code* (the "*Code*") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Section 5(1) of the *Code* prohibits discrimination in employment on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status and handicap.

In addition, section 11(1) of the *Code* establishes that the right of a person is infringed where a requirement, qualification or factor exists that is not a prohibited ground of discrimination, but results in the exclusion or restriction of a group of persons who are identified by a prohibited ground of discrimination, unless the requirement or factor is reasonable and *bona fide* (in good faith).

Section 23(2) of *Code*, prohibits the use of application forms, or written or oral inquiries, which directly or indirectly classify or indicate qualifications of an applicant as being a member of a group that is protected from discrimination.

2. Where Driving is Not an Essential Duty of a Job

A driver's licence contains personal information about an individual which could lead to the classification of a job applicant according to a prohibited ground of discrimination, contrary to section 23(2) of the *Code*. Therefore, unless a driver's licence is required to enable a person to perform

the essential duties of a job, it should not be requested in an application form or during an employment interview.

Example: A driver's licence contains information about a person's date of birth. Requesting a job applicant to provide a photocopy of his/her driver's licence would yield information about the applicant's age, which would be contrary to section 23(2) of the *Code*.

Similarly, information on a driver's licence could yield information about whether or not an applicant has a handicap. This in turn could lead to the classification of applicants as members of a group identified by a prohibited ground of discrimination.

3. Where Driving is an Essential Duty of a Job

For positions where driving is an essential duty of the job, a question relating to whether or not an applicant is licenced to drive, and/or the type of vehicle the applicant is licenced to drive, would be appropriate. The legitimate needs of the employer and the concerns of the applicant might be served by including the following statement on an application form or in a job advertisement:

This position requires the successful candidate to have a valid driver's licence. The successful candidate would have to provide proof that s/he has a valid driver's licence upon being hired.

Employers should determine which jobs within their organization involve driving as an essential duty. Applications for these positions should include a statement relating to the need for successful candidates to provide proof that they possess a valid driver's licence.

Section 23(3) allows for employers to ask applicants if they have a valid driver's licence during a personal interview for positions in which driving is an essential duty.

3.1 Duty to Accommodate (section 17)

Section 17(2) of the *Code* requires an employer to accommodate the needs of a person with a disability in the performance of the essential features of a job, unless it could be demonstrated that the needs of the person cannot be accommodated short of undue hardship on the person responsible for accommodating those needs.

In some cases, an individual may be licenced to drive a vehicle with modified driving apparatus, because of a particular disability. For positions that involve driving as an essential duty, an employer would have a duty to accommodate the needs of a person with a licence to drive a modified vehicle only, short of undue hardship, to enable that person to perform the essential duties of the position. Undue hardship would include consideration of any costs or health and safety factors related to the accommodation.

Example: An employer may be able to accommodate the needs of a travelling salesperson with a mobility-related disability by purchasing and installing a set of hand-controls into a company car.

In some circumstances, the nature or degree of a person's disability might be such that the employer cannot accommodate the individual without incurring undue hardship.

3.2 Record of Offences

Where driving is an essential duty of the job, an employer may refuse to consider an applicant who has a poor driving record even though the *Code* protects persons who have committed a violation under the *Highway Traffic Act*.

Example: A company can refuse to hire a school bus driver who has accumulated too many demerit points.

At the same time, the *Code* does not protect persons who were convicted for careless driving under the *Criminal Code* and who have not been pardoned.

4. Relevant Ontario *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 5, 10, 11(1)(2), 17(1)(2) and 23(1)(2)(3).

POLICY ON SCHOLARSHIPS AND AWARDS

Approved by the Commission: July 8, 1997

POLICY ON SCHOLARSHIPS AND AWARDS

Policy on Scholarships and Awards

1. Introduction

The Ontario *Human Rights Code* (the "*Code*") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

This policy deals with scholarships or other forms of awards or grants that are available only on a limited basis to individuals who are identified by a ground set out in the *Code*. These grounds include race, sex, colour, religion, age and ethnic origin, to name a few. These types of scholarships or awards are called "exclusionary" because only certain individuals can apply for them, while others, who do not share the same characteristics, are excluded.

This policy provides information to potential applicants, sponsoring organizations and educational institutions about how the *Code* applies to exclusionary scholarships and awards. It should be noted that this policy applies whether the organization or body conferring the scholarship or award is public or private. It also applies to trusts and other entities that may be required to act on the instructions or directions of a third party, such as a trust settlor or other benefactor.

2. Equality

Section 1 of the *Code* provides that every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. Education and access to educational facilities are "services" under the *Code*. Obviously, the means to access those services are directly or indirectly related

to education.¹ As well, scholarships and awards are significant for reasons other than monetary value alone. Recipients of scholarships or awards have benefits in employment and access to post-graduate training. If a person is unable even to compete for the assistance that leads to these benefits, he or she is placed at a significant disadvantage.

Criteria such as race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap, etc. should not be the basis for deciding who gets a scholarship, unless particular exceptions apply. As late as 1990, the Ontario Court of Appeal examined a scholarship based on explicitly racist criteria.

The *Canada Trust* case involved a scholarship that was restricted to Protestant "Christians of the White race". According to the trust document, the person who had set up the trust believed that "the White race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the world ...". The Court of Appeal's response to this trust is worth reproducing:

To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to [state] the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society, in which equality rights are constitutionally guaranteed, and in which the multicultural heritage of Canadians is preserved and enhanced.²

Public awareness of human rights issues and sensitivity to their social impact have developed considerably in recent years: legitimate concerns are raised when one group is promoted at the expense of another, or when advantages for some simply reinforce disadvantages for others. Many universities and colleges refuse to administer awards that are restricted to persons of a particular ethnic origin. Benefactors have, in some cases, changed their eligibility criteria so that awards are now granted according to merit, ability or potential. For example, it is preferable for a scholarship or other award to be restricted to persons wishing to pursue Italian studies rather than to a person of Italian origin.

For these reasons, the Ontario Human Rights Commission takes the position that scholarships and awards should be based on factors such as merit, personal financial need, course specialisation, or recognition for special contributions to academic or extracurricular life. Exclusionary scholarships or awards, on the other hand, use discriminatory criteria to assess eligibility. These criteria affect access to educational opportunities, directly or indirectly. Scholarships or awards that designate a specific minority or ethnic group

infringe the *Code*, unless they qualify as a “special program” that is designed to relieve economic hardship or disadvantage, or designed to achieve equality of opportunity. Section 14 of the *Code* is discussed below

3. Exceptions

“Discrimination” in human rights law does not simply mean treating someone differently. In human rights law, it means treating someone differently because of personal characteristics that are based on the grounds set out in the *Code*. The *Code* will apply, therefore, where the treatment is based on these characteristics and has the effect of imposing burdens or disadvantages on one group that are not imposed on others, or that limits or withholds opportunities and benefits.³ Seen from this standpoint, equality of opportunity operates to permit certain forms of differential treatment if the impact and intent is to remove those burdens or disadvantages. Temporary measures therefore may be necessary or desirable to assist persons who have been subjected to disadvantage or hardship. These measures are called “special programs”.

3.1 Special Programs

The *Code* allows for a special program that creates a preference or advantage, even though it is based on grounds that are set out in the *Code*. Section 14 allows programs designed to:

- relieve hardship or economic disadvantage;
- assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity; or
- help eliminate the infringement of rights that are protected under the *Code*.

The Commission is of the view that for section 14 to apply, the underlying basis for the program should be related to a ground set out in the *Code*.⁴ For example, section 14 will not apply to members of a group who share a political affiliation, even if they have been subject to hardship, because political views are not covered by the *Code*.

Scholarships or awards should only be exclusionary if hardship or economic disadvantage is linked to the ground selected as a criterion for eligibility. It should also be clear that the special program is designed to relieve that hardship or disadvantage. Some scholarships are restricted to members of particular groups on the erroneous assumption that the group's members are disadvantaged. For example, scholarships awarded to “mature students” are sometimes awarded to persons more than 25 years of age, a group that

does not share a pattern of economic hardship or historical disadvantage. Different levels of financial needs may exist across a group that may not be demonstrably linked to age, marital status or other grounds that are assumed to apply.

The Commission has *Guidelines on Special Programs*, that should be referred to in the event that a person wishes to set up or administer a scholarship or award on an exclusionary basis. In brief, the special program should state clearly:

- why the identified persons or groups are considered to be experiencing hardship, economic disadvantage or discrimination;
- how the proposed measures will relieve the hardship, economic disadvantage, or discrimination, that is, how the target groups will be assisted; and
- that the program is for a specific period of time and is of a temporary nature.

If a scholarship or award is a valid special program, that is, if it meets the criteria set out in the *Code* and in the Commission's *Guidelines on Special Programs*, it will not be found to be contrary to the *Code*. Scholarships and awards are assessed on a case-by-case basis.

In the light of the direction from the Court of Appeal in the *Canada Trust* case, educational institutions may prefer to consider the impact of scholarship restrictions on overall equality. Universities that offer a number of scholarships are encouraged to attempt to achieve an overall balance so that disadvantaged groups have reasonable access to educational services.

Example: If a particular program has a number of scholarships for women, and none for persons with a disability, the university may wish to try to attract a benefactor for the latter group, or may establish an award from its own resources.

3.2 Canadian Citizenship or Permanent Residence Status

Section 16(2) provides an exception to the *Code* by permitting a requirement, qualification or consideration to be adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence. This means that citizenship or permanent residence may be a requirement for a scholarship or award. However, it must be adopted for the purpose of "fostering and developing participation" in educa-

tional and other activities that are set out in the *Code*. (See the *Code* sections listed at the end of this chapter).

3.3 Special Interest Organizations (section 18)

This section is in response to inquiries from universities as to whether section 18 of the *Code* applies and whether it allows exclusionary scholarships or awards.

Section 18 of the *Code* allows a religious, philanthropic, educational, fraternal or social institution or organization, which primarily serves the interests of a particular group, to restrict membership or participation to members of that group. Provided that an organization comes within section 18, it will be able to restrict eligibility for scholarships and awards only if the recipient is a member or a participant. Simply being awarded a scholarship does not mean that the recipient is necessarily a member of the special interest organization.

Example: A fraternal association that offers an open scholarship for boys would only be protected from a challenge under the *Code* if the fraternity primarily serves the interests of boys and if membership and participation in the fraternity is linked to receipt of the scholarship.

Example: A Roman Catholic institution may seek to restrict awards for divinity studies to Roman Catholics who intend to study for the priesthood. Similarly, a Jewish Hebrew school may declare that only Jewish students are eligible for enrolment in that school which may also designate scholarships or other financial awards strictly for Jewish applicants.

3.4 Scholarships as an Employment Benefit (section 24(1)(d))

Financial assistance in the form of scholarships or awards offered by employers to employees and their families are a form of assistance that provides advancement or benefits to eligible individuals. The *Code* allows this form of assistance, although it is limited to persons who are identified by their family or marital status. It is the Commission's view that educational subsidies offered to employees and their families are acceptable as a legitimate form of exclusionary benefit related to employment.

4. Summary

A scholarship or award is an advantage or benefit to persons seeking employment or access to further education and training. For this reason, scholarships and other academic awards result in a benefit to some students,

while excluding others who may be historically disadvantaged. Therefore, scholarships that restrict eligibility on the basis of prohibited grounds in the *Code* are not permissible unless the award:

- qualifies as a special program pursuant to section 14(1); or
- is restricted to Canadian citizens or permanent residents if the scholarship is for the purpose of fostering and developing participation in educational or other activities set out in section 16(2) of the *Code*; or
- is awarded by a religious, philanthropic, educational, fraternal or social institution or organization, to a member (section 18); or
- is an employment benefit to employees and their families (section 24(1)(d)).

5. Relevant *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 1, 9, 14(1), 16(2), 18 and 24(1)(d).

ENDNOTES

¹ Section 9 provides that no person shall infringe or do, directly or indirectly, anything that infringes a right to equal treatment.

² *Canada Trust Co. v. Ontario (Human Rights Commission)*, (1987) 12 C.H.R.R. D/184 at D/191.

³ See generally *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

⁴ Race, ancestry, colour, place of origin, ethnic origin, citizenship, nationality, creed, sex, family status, marital status, age, handicap, receipt of public assistance (in accommodation only), record of offences (in employment only).

POLICY ON SEXUAL HARASSMENT AND INAPPROPRIATE GENDER-RELATED COMMENTS AND CONDUCT

Approved by the Commission: September 10, 1996

POLICY ON SEXUAL HARASSMENT AND INAPPROPRIATE GENDER-RELATED COMMENTS AND CONDUCT

1. Introduction

The Ontario *Human Rights Code* (the “*Code*”), states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Inherent in this objective is the goal of ensuring that everyone can live and work in an environment which is free from harassment based on a prohibited ground of discrimination under the *Code*. The *Code* establishes the right to equal treatment without discrimination based on sex. Freedom from sexual harassment and other forms of unequal treatment expressed through demeaning comments and actions based on gender¹ is, therefore, a fundamental human right.²

Discrimination based on sex includes what is commonly referred to as sexual harassment or inappropriate comments and actions of a sexual nature.³ The protection provided by the *Code* covers five areas of social interaction, namely, services, goods and facilities, occupancy of accommodation, contracts, employment, and membership in vocational associations such as trade unions.

Harassment and discrimination based on sex may not always be of a sexual nature. Sex discrimination may also include harassing comments or conduct made to a person because of his or her gender.⁴

Example: A supervisor may continuously interrupt a female employee during meetings or comment on her physical appearance in a way that sets her apart from male employees as not being a fully participating equal in the organization, or by making such statements as “women don’t belong in the boardroom”.

The comments or conduct do not have to be made with the intention to discriminate to be in violation of the *Code*.

2. Purpose of the Guidelines

The purpose of these guidelines is to assist individuals, community organizations and business establishments to understand the scope of the protection provided by the *Code* with regard to sexual harassment and inappropriate gender-related comments and conduct. This policy makes a clear distinction between accepted social interaction or consensual relations, and behaviour which is known or ought reasonably to be known to be unwelcome.

The policy also provides a framework for educational initiatives such as the development of training materials, anti-harassment policies and internal human rights complaint-resolution mechanisms by employers and other establishments.

3. The Ontario *Human Rights Code* and Sexual Harassment

Sexual harassment and inappropriate gender-related comments and conduct are complex issues which often involve one person's attempt to assert power over another. Sexual harassment and unequal treatment based on gender typically, but not exclusively, involves the exercise of power and authority over women, resulting in the reinforcement of a woman's subordinate status in relation to men.⁵ It is important to note that sexual harassment and inappropriate gender-related comments and conduct are prohibited regardless of the gender of the persons involved. The Commission has received complaints by men against women, as well as complaints involving persons of the same sex.

This power relationship can be particularly evident in employment situations. However, women tend to be more vulnerable to harassment by men, because relative to men, more women hold lower-paying, lower-authority and lower-status positions in the workplace. At the same time, even women in positions of authority are not free from sexual harassment or inappropriate gender-related behaviour.

Regardless of her position, this type of behaviour can diminish a woman's status and image in the eyes of other employees. Inappropriate gender-related comments or conduct can also endanger the continued employment of the harassed individual by negatively affecting her or his work

performance, or undermining her or his sense of personal dignity, or in some cases causing physical and emotional illness.

3.1 The Code

Sections 1, 2, 3, 5, 6 and 9 of the *Code* set out the basic right to equal treatment without discrimination because of sex in the areas of services, goods and facilities, occupancy of accommodation, contracts, employment, and vocational associations.

As stated earlier, sex discrimination includes inappropriate comments or conduct that are not, narrowly speaking, entirely sexual in nature.

The *Code* also includes provisions that specifically address sexual harassment in employment and accommodation, as well as sexual solicitation and reprisal for refusing a sexual advance.

3.1.1 The Definition of "Harassment" Under the Code

Section 10(1)(f) of the *Code* defines "harassment" as meaning:

engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

3.1.1(a) A Course of Vexatious Comment or Conduct

According to the definition of harassment in section 10(1)(f) of the *Code*, more than one event, or a "*course* of vexatious⁶ comment or conduct" [emphasis added], must take place for there to be a violation of the *Code*. However, one incident could be significant or substantial enough to be interpreted by the Commission as constituting a breach of sections 1, 2, 3, 5 or 6 of the *Code*. Such an incident could be interpreted by the Commission as having an impact that is substantial enough to create a "poisoned environment" for some individuals because of their sex.

3.1.1(b) Ought Reasonably to be Known to be Unwelcome

Comment or conduct "that is known or *ought reasonably to be known to be unwelcome*" [emphasis added] contains a subjective and an objective element. First, the harasser's own knowledge of how his or her behaviour is being received is part of the test. Second, from the point of view of a reasonable third party as well, i.e. how such behaviour might generally be received. In other words, the Commission or the board of inquiry can conclude, on the basis of the evidence before it, that an individual knew, or should have known that his or her actions were unwelcome.⁷

Traditionally, the standard for judging such knowledge was based on the perspective of a "reasonable person", with "reasonable person" being drawn primarily from a male perspective. It included stereotypical notions of what forms of behaviour are, or are not, acceptable.

The proper objective standard should reflect full substantive equality.⁸ The standard used to determine what the harasser ought to know is still gauged from the perspective of the "reasonable person".⁹ However, the concept of the "reasonable person" has evolved to take into account the specific perspective of the person who is harassed; this means considering factors that ought reasonably to be known about the harassed person and his or her perspective as a member of a group protected under the *Code*.

Example: A supervisor's ongoing questions to a woman about when she is going to marry and start having children may make this employee feel uncomfortable for a number of reasons. Her discomfort may be related to her own cultural background, a fear of losing her job, or to reasons related to other prohibited grounds of discrimination under the *Code*, such as creed, sexual orientation, or age.

As noted above, other prohibited grounds of discrimination such as race, creed, marital status, or disability, may be intertwined with issues of gender. For persons who are members of more than one protected group, certain forms of behaviour could have a particularly adverse impact.¹⁰

Example: Women with disabilities may feel particularly vulnerable to harassment and sexual assault. Inappropriate comments or conduct related to gender which may not necessarily be considered by some as problematic, may be viewed as particularly offensive or threatening by a woman with a disability.

It can reasonably be understood that some types of comments or behaviour are unwelcome based on the response of the person subjected to the behaviour, even when the person does not explicitly object. An example could be a person walking away in disgust after a co-worker has asked questions of a sexual nature.

As previously noted, a person does not have to make explicit reference to another person's gender or be explicitly sexual for the behaviour to be contrary to the *Code*. Someone could indirectly harass a female employee in his area, with the intent of discouraging or driving her away from continuing her employment in a particular position, because she is a woman.¹¹

3.1.2 Harassment in Accommodation and Employment

Sections 7(1) and (2) of the *Code* establish a person's right to be free from sexual harassment and inappropriate gender-related comments and conduct in occupancy of accommodation and employment. Section 7(1) states:

Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or an agent of the landlord or by an occupant of the same building.

Section 7(2) states:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

3.1.3 Sexual Solicitation or Advance

Section 7(3)(a) of the *Code* sets out a person's right to be free from unwelcome sexual advance or solicitation from an individual who is in a position to grant or deny a benefit to the person. The section states that:

Every person has a right to be free from a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

This provision of the *Code* is violated when the person making the solicitation or advance knows, or should reasonably know, that such behaviour is unwelcome.

Example: A professor or teacher makes an unwelcome sexual advance to a student and implies or explicitly makes it known that if s/he does not accept, she or he would likely not obtain passing grades. In a rental accommodation situation, a building superintendent makes granting a tenant's request for a transfer to a larger unit conditional upon receipt of sexual favours.

Sexual solicitation or advances covered by section 7(3)(a), can also occur between co-workers where one person is in a position to grant or deny an employment-related benefit to the other.

Example: A situation could develop in which one worker makes the sharing of important job-related information with a colleague conditional upon the receipt of sexual favours from that colleague.

3.1.4 Reprisal

Section 7(3)(b) of the *Code* sets out a person's right to be free from reprisal or threats of reprisal for rejecting a sexual solicitation or advance by someone who is in a position to grant or deny a benefit. Section 7(3)(b) states that:

Every person has a right to be free from a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Example: A manager who fires an employee, or denies her or him a promotion because the employee refused a sexual proposition would be violating the employee's rights under section 7(3)(b). Similarly, a social worker who threatens to prepare a negative report which would disqualify a welfare recipient who has refused a sexual advance by the worker would also be in violation of section 7(3)(b) of the *Code*.

Section 8 of the *Code* provides additional protection against reprisal for claiming and enforcing one's rights under the *Code*. Section 8 states that:

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act, and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

3.1.5 Association

Section 12 of the *Code* protects the rights of a person who is associated with a person who is member of a group identified by the *Code*. It states that:

A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

3.1.6 "Poisoned Environment"

As noted above, a specific instance of sexual harassment or inappropriate gender-related comments or conduct might not meet the literal definition of harassment under the *Code*. However, there could be circumstances in which a single incident of inappropriate behaviour may be significant or substantial enough to constitute a breach of the *Code*, by creating a "poisoned environment" for some individuals because of their sex. In other words, there could be circumstances in which unequal treatment does not have to occur continually or repeatedly for there to be a violation of the *Code*.

Sections 1, 2, 3, 5 and 6 of the *Code*, which provide protection from sex discrimination in general, can be the basis for a claim that the inappropriate behaviour was substantial enough to create a “poisoned environment”, resulting in unequal terms and conditions in employment, occupancy of accommodation, the provision of services, contracting, or membership in a vocational association. In an employment situation, for example, a poisoned environment can cause emotional or psychological stress for some persons in a particular environment because of their sex. Such stress could have a significant negative impact on the person’s overall health and/or performance on the job.

The concept of a poisoned environment as a form of harassment or discrimination is based on the impact of the comments or conduct on an individual because of her or his sex, rather than the number of times the behaviour occurs. A poisoned environment can be created by the comments or actions of any person regardless of his or her position of authority or status in a given environment, including a co-worker, supervisor, manager, co-tenant, etc.

Example: A single action giving rise to a poisoned environment could be a statement made by a union representative, expressing the belief that women in general, or women of a certain race or ethnic background, are not suitable as union representatives. Similarly, a poisoned environment may be created by the distribution or publishing of written materials on a college campus by male students about women which are seen to have a threatening or intimidating content.¹²

Even if the comments or conduct are not directed at one person, another individual may still experience a poisoned environment because she or he is also a member of the group targeted. A person whose co-worker receives this unequal treatment or who hears someone tell an offensive joke to another may view the behaviour as poisoning the environment.¹³

As earlier indicated, sexual harassment is often interpreted as objectionable comments or conduct of a “sexual” nature. However, sexual harassment, in the broader context of unequal treatment based on gender, may refer to instances where the behaviour is not overtly sexual in nature, but is related to the person’s gender, and demeans or causes personal humiliation or embarrassment to the recipient.

Examples of sexual harassment and inappropriate gender-related behaviour within the meaning of the *Code* include, but are not limited to, comments, gestures and non-verbal behaviour, visual materials, and physical

contact. The following is not an exhaustive list but should assist in identifying what may constitute sexual harassment or inappropriate gender-related comments and conduct:

- (i) gender-related comments about an individual's physical characteristics or mannerisms;
- (ii) unwelcome physical contact;
- (iii) suggestive or offensive remarks or innuendoes about members of a specific gender;
- (iv) propositions of physical intimacy;
- (v) gender-related verbal abuse, threats, or taunting;
- (vi) leering or inappropriate staring;
- (vii) bragging about sexual prowess;
- (viii) demands for dates or sexual favours;
- (ix) offensive jokes or comments of a sexual nature about an employee, client, or tenant;
- (x) display of sexually offensive pictures, graffiti, or other materials;
- (xi) questions or discussions about sexual activities;
- (xii) paternalism based on gender which a person feels undermines his or her self-respect or position of responsibility;
- (xiii) rough and vulgar humour or language related to gender.

A situation could arise in which particular comments or actions might not be intended to offend another person, but result in a violation of that person's rights under the *Code*. The reason for this is that intent is not a prerequisite to establishing that the treatment is discriminatory.¹⁴ Rather, the Commission looks to the effect or the result of the comments or actions on the recipient.

Example: Even the best-intentioned "compliments" regarding a woman's appearance, hair, clothes, *etc.*, if made on a repeated basis in the work environment, or during a formal business meeting, can set a woman apart as different. Such comments also undermine her credibility as a professional.

4. Burden of Proof: Evidentiary Issues

Sexual harassment and inappropriate gender-related comments and conduct do not frequently occur in full public view. Since there are often no witnesses or material evidence to these comments or conduct, issues of

evidence and credibility often arise in complaints alleging sexual harassment.¹⁵

Under the *Code*, the onus of proving an allegation of sexual harassment or inappropriate gender-related behaviour rests with the complainant. After a matter is referred to a board of inquiry the Commission has to demonstrate before the board that, on a “balance of probabilities”, there was a contravention of the *Code*. The burden of proof for demonstrating harassment under the *Code* is not as onerous as the proof required for establishing guilt in criminal cases.

Proving a case on a “balance of probabilities” is a civil burden of proof, meaning that there is evidence to support the allegation that the comments or conduct “more likely than not” took place, and that the behaviour constituted sexual harassment or inappropriate gender-related comments or conduct within the meaning of the *Code*.

Example: An investigation into a complaint may reveal that the complainant did not welcome or consent to the behaviour alleged to have occurred. It is then up to the respondent to demonstrate that the behaviour did not occur or did not constitute a violation of the *Code*. The respondent may introduce evidence that the complainant is mistaken, or misinterpreted the comments or conduct.

In the absence of independent witnesses or corroborating evidentiary material, complaints alleging sexual harassment often turn on the credibility of the parties. Boards of inquiry have accepted that it is difficult sometimes to make a finding based on credibility only, but acknowledge that boards often have to rely on subjective evidence presented.

Where credibility is at issue, similar fact evidence¹⁶ may be introduced to show that a pattern of behaviour might have occurred.

Example: Similar fact evidence could include testimony from others who indicate that they have been treated similarly, based on their gender, by the alleged harasser. It may also show intent or wilfulness, which could call into question the credibility of a respondent whose defence is that the conduct was intended to be a joke, or was a mistake or the result of a misunderstanding.

5. Corporate Liability

Section 45 of the *Code* establishes that a corporation is liable for the actions of an officer, official, employee or agent of the corporation, when such actions are done in the course of their employment. Section 45 also provides

an exception to this corporate liability with regard to the harassment provisions of sections 2(2) and 5(2), and section 7. In instances of harassment within the framework of sections 2(2) or 5(2), or section 7 of the *Code*, the corporate respondent¹⁷ may not necessarily be liable where it can be established that the respondent was unaware of, or had no reason to believe that there was a problem relating to sexual harassment.

However, the liability of the corporation with regard to sections 2(2) or 5(2), or section 7 is restored, if the offending party is a part of or is the actual "directing mind" of the corporation.¹⁸ In such a situation, a "directing mind" represents the persona of the corporation itself, as if the two were the same, and the latter becomes liable because it is deemed to have breached the *Code*.

Therefore, corporate liability may be found:

- (a) where the employer's personal action, either directly, or indirectly, infringes a protected right, or authorizes or condones, the inappropriate behaviour; or
- (b) where an employee responsible for the harassment or inappropriate behaviour, or who knew of the sexual harassment or inappropriate gender-related behaviour, or that a poisoned environment existed, but did not attempt to remedy the situation is part of the "directing mind" of the corporation.¹⁹

5.1 "Directing Mind": An Employer or its Agents

Employees with supervisory authority may be viewed as part of a corporation's "directing mind", if they function, or are seen to function as a representative of the organization itself. Generally speaking, an employee who performs management duties is part of the "directing mind" of the corporation.²⁰ If an employee is part of the "directing mind" of the corporation and a violation of the *Code* occurs while this person is carrying out corporate duties, the act of the employee becomes an act of the corporation.

A person who is a central decision-maker in a service provision or accommodation-related situation may also be liable if she or he knew of the harassment or inappropriate gender-related comment or conduct and did not address it. A community centre supervisor or a superintendent of a rental accommodation facility are examples of persons who may be seen as part of the "directing mind" of an organization.

Persons who are not identified as supervisors *per se*, including members of the bargaining unit, may also be "directing minds" if they have supervisory authority or have significant responsibility for the guidance of employees.

Example: A head chef has the responsibility to address such problems if they arise among the kitchen staff.

Example: A lead-hand who is part of the bargaining unit would have "directing mind" authority with regard to union members.

A corporate employer may also be responsible for a supervisor's actions where the employer had, or should have had, knowledge of the harassment and failed to take immediate and appropriate action to correct the situation.

On being made aware of such inappropriate comments or conduct, an employer is required to take immediate action to remedy the situation. In particular, where the employer is satisfied that the allegation has been substantiated, the employer should consider both disciplinary action and preventive steps including the development and introduction of policy statements and educational initiatives. Depending on the fact situation, disciplinary measures could range from a verbal warning or a letter of reprimand to termination of employment.

It should be noted that an employer may also be held liable for incidents of sexual harassment or inappropriate behaviour in situations involving activities or events which occur outside of normal business hours or off business premises, but are linked to the workplace and employment.

Example: An employer may be held liable for incidents that take place during business trips, company parties, or other company-related functions.

5.2 Obligation to Maintain a Harassment-Free Environment

Employers, rental accommodation providers, service providers, professional associations, and unions all have an obligation to ensure that their respective environments are free from behaviour that could constitute sexual harassment. An employer may be responsible for harassment by supervisors, managers, co-workers, and in some cases non-employees, who are present in the workplace, particularly if the employer knew or should have known about the alleged harassment and failed to take remedial action.

Liability on the part of an organization for harassment of its employees by non-employees, such as customers, will depend on the facts of a particular situation, including the employer's knowledge of and control over the situation, and what corrective measures might be available.

Example: A fitness club owner, on learning of female or male staff being sexually harassed by a patron or someone who is a member of the club, has an obligation to address this problem. If the allega-

tions can be substantiated, the owner may decide to suspend or not renew the harasser's membership. Membership agreements usually contain clauses permitting the club to deal with members in such circumstances.

Example: The superintendent or manager of a building, on becoming aware that female tenants are being harassed by non-residents in the unlocked laundry, is under an obligation to take steps to correct the situation, such as securing the laundry room from non-tenants.

6. Remedies under the *Code*

The purpose of human rights legislation is not to find fault but to eliminate discrimination and to provide redress. It is meant to be preventative and remedial, rather than punitive.²¹ A remedy to a complaint might include restoring the complainant to a position the individual would have held had the *Code* not been violated. It may consist of compensation for loss of earnings or job opportunities, or damages for mental anguish suffered as a result of the violation.

Human rights remedies also address issues of public interest. This may include requiring changes to an organization's policies, the implementation of training initiatives, the establishment of internal human rights complaint-resolution mechanisms, introduction of anti-harassment policies, a written apology, *etc.*

7. Filing a Complaint

When a person believes that she or he has been subjected to sexual harassment or other forms of inappropriate gender-related comments or conduct, the individual should seek to resolve the problem through any internal policies or resolution mechanisms the organization may have in place. However, while many companies now have internal human rights complaint-resolution mechanisms, these procedures do not replace an individual's right to file a complaint with the Commission. A complaint filed with the Commission may be withdrawn at any time during the complaint process. Under section 34 of the *Code*, the Commission has the discretion to refuse to deal with certain complaints, where the matter: (1) can be more appropriately dealt with under another provincial statute; (2) is "trivial, frivolous, vexatious or made in bad faith"; (3) is not within the Commission's jurisdiction, or (4) is based on facts which are more than six months old.

Example: The Commission may exercise its discretion to not deal with a complaint if it appears to the Commission that the person is bringing the complaint in order to embarrass an organization or another person, or if the allegations relate to events that occurred more than 6 months before the person files a complaint with the Commission, or where there is a grievance procedure in place under a collective agreement to address complaints of discrimination in the workplace.

8. Collective Agreements and Company Policies

As many sexual harassment complaints arise in the context of employment, the Commission encourages employers and organizations to take responsibility for preventing and remedying incidents of sexual harassment and inappropriate gender-related comments and conduct. The Commission encourages organizations to develop and adopt in-house anti-harassment policies and to ensure that the workplace is properly informed and educated about the nature, effects, and cost of this type of behaviour.

8.1 Collective Agreements

An increasing number of collective agreements and company policies include specific clauses relating to the prevention and resolution of incidents of discrimination and sexual harassment in the workplace. Employers and labour representatives are recognizing their liabilities under the *Code*, as well as their shared responsibility to maintain workplace environments that are free from sexual harassment.

Persons are not obligated to exhaust an internal complaint resolution mechanism before considering other avenues of complaint such as approaching the Commission or filing a grievance. An individual may elect to file two complaints at the same time — one under the employer's internal policy and one with the Commission. However, if there is a grievance procedure in place under a collective agreement, the Commission may elect to exercise its discretion under section 34 of the *Code*, and decide to not deal with a complaint. This is because section 48(12)(j) of the *Labour Relations Act* allows labour arbitrators to interpret and apply human rights legislation.

8.2 Internal Policies

Internal anti-harassment and anti-discrimination policies do not fall under provincial legislation and therefore the Commission does not consider them in the same way as the grievance procedure under a collective agreement.

This means that there is the option of contacting the Commission if the resolution obtained through the in-house process is not satisfactory. In which case, the complaint *should* be filed within the six-month limitation period which begins from the time of the alleged harassment. Failure to do so could result in the Commission deciding not to deal with the complaint, subject to section 34(1)(d) of the *Code*.

9. For Further Information

To assist employers in developing in-house policies on any or all of the protected grounds under the *Code*, the Commission has developed the publication *Developing Procedures to Resolve Human Rights Complaints Within Your Organization*. This publication outlines the elements which ought to be taken into account by organizations when developing or reviewing internal anti-harassment and anti-discrimination policies.

10. Relevant *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 1, 2(1)(2), 3, 5(1)(2), 6, 7(1)(2)(3), 8, 12, 34(1) and 45(1)(2).

ENDNOTES

- ¹ *Re Canada Post Corp. and Canadian Union of Postal Workers* (1988), 34 L.A.C. (3d) 27.
- ² *Re Canada Post Corp. and Canadian Union of Postal Workers* (1988), 34 L.A.C. (3d) 27.
- ³ *Bell v. Ladas* (1980), 1 C.H.R.R. D/158 (Ont. Bd. of Inquiry).
- ⁴ *Shaw v. Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. of Inquiry).
- ⁵ *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Ont. Bd. of Inquiry).
- ⁶ "Vexatious conduct or comment" refers to actions or words that provoke, irritate, threaten, annoy, insult or demean, or result in some other form of discomfort.
- ⁷ *Reed v. Cattolica Investments Ltd. and Salvatore Ragusa* (March 26, 1996), McNeilly, G., unreported (Ont. Bd. of Inquiry).
- ⁸ The substantive model of equality looks to the effect or result of the differential treatment rather than treating everyone in the same manner.
- ⁹ The question to be asked is: "Would a person on the street, who is a member of the protected group (such as an Asian woman or a lesbian), and who experiences the behaviour in question, share the view that the behaviour was inappropriate?" Note that not all members of a group have to agree that the behaviour was inappropriate.
- ¹⁰ See further *Cuff v. Gypsy Restaurant* at note 5.
- ¹¹ See further *Shaw v. Levac* at note 4.
- ¹² *Saskatchewan (Human Rights Commission) v. Engineering Society* (1989), 10 C.H.R.R. D/5636 (Sask. Bd. of Inq.).
- ¹³ Depending on the fact situation, a human rights complaint may be filed under Part I of the Code, or be based on discrimination because of association (section 12). See further, Judith Keene, *Human Rights in Ontario* (Toronto: Carswell, 1992) at 145.
- ¹⁴ W.S. Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: De Boo, 1982), at 109-122.
- ¹⁵ *Phillips v. Hermiz* (1985), 5 C.H.R.R. D/2450 (Sask. Bd. of Inq.).
- ¹⁶ "Similar fact evidence" is evidence of past similar conduct by the alleged harasser which may be relied upon to support an allegation of harassment. The usefulness of this kind of evidence in supporting a claim of harassment depends mostly on whether the past incidents of misconduct are sufficiently similar to the kind of harassment alleged by the complainant. For example, were other female employees in receipt of similar comments or treatment by the respondent?
- ¹⁷ "Corporate respondent" is the business entity which may be held responsible for conduct of persons who are associated with the business and who are alleged to have contravened the Code.
- ¹⁸ *Edilma Olarte et al. v. Rafael deFilippis and Commodore Business Machines Ltd.* (1983), 4 C.H.R.R. D/1744 [4] and [5], affirmed (1984), 14 D.L.R. [4th] 118 (Div. Ct.).

¹⁹ *Kerryann Henwood v. Gerry Van Wart Sales Inc. and Claudio Saggese* (February 21, 1995), Anand, R., unreported (Ont. Bd. of Inquiry).

²⁰ *Michael Naraine v. Ford Motor Company of Canada Ltd., et al.* (July 25, 1996), Backhouse, C., unreported (Ont. Bd. of Inquiry).

²¹ *Robichaud v. Canada (Treasury)* [1987] 8 C.H.R.R. D/4326 (CHRT).

POLICY AND GUIDELINES ON DISABILITY AND THE DUTY TO ACCOMMODATE

Revised Version Approved by the Commission: November 23, 2000

POLICY AND GUIDELINES ON DISABILITY AND THE DUTY TO ACCOMMODATE

Introduction

Under the Ontario *Human Rights Code*¹ (the “*Code*”), everyone has the right to be free from discrimination because of handicap or perceived handicap in the social areas of employment, services, goods, facilities, housing, contracts and membership in trade and vocational associations. This right means that persons with disabilities² have the right to equal treatment, which includes the right to accessible workplaces, public transit, health services, restaurants, shops and housing.

Almost one-third of complaints filed with the Ontario Human Rights Commission are on the ground of disability. Most are in the area of employment, with services constituting the second-largest area. For this reason, this Policy focuses on the workplace, with specific guidance to support employers, unions and employees in the fulfilment of their duties and rights under the *Code*.³

In 1989, the Ontario Human Rights Commission published its *Guidelines on Assessing Accommodation Requirements for Persons with Disabilities*. These *Guidelines* were introduced after extensive consultations with stakeholders, and created for the first time a standard for the interpretation of “undue hardship”. The *Guidelines* have been cited before Boards of Inquiry and the Courts, and have become an important interpretative tool. Since that time, there have been several important legal decisions, notably from the Supreme Court of Canada, with respect to the ground of disability and the duty to accommodate. These decisions have assisted the Commission in its evolving understanding of equality for persons with disabilities. Significantly, the Supreme Court has noted the need to adapt society so that its structures and attitudes include persons with disabilities. This requires a shift in our approach to the entire area, one that affirms the centrality of human dignity in achieving equality.

In 1999, the Commission invited stakeholders to provide input on the revisions to the *Guidelines*. Over 150 stakeholders were approached. They represented a broad spectrum of interests, including consumers and organi-

zations from the disability community, employer associations, educational institutions, law firms, labour, provincial and municipal government agencies, business and trade associations and service providers.

Several themes emerged from these consultations and have informed these revisions:

- There is a need to reaffirm the standard of undue hardship that was created in 1989.
- While undue hardship is a high standard, it is necessary to ensure equality. It is, in this sense, “reasonable” and accommodation to the point of undue hardship is “reasonable accommodation”.
- Individual accommodation has grown in significance as a central principle of human rights law.
- More guidance is needed on the definition of disability, as well as more practical direction on the steps required in the accommodation process.
- The principle of design by inclusion and barrier removal has to be underscored.
- More information on the needs of persons with mental disabilities is a priority.
- Unions and employee associations have a critical role to play in the accommodation process.
- There is a need to clarify the impact of accommodation on performance standards and on access to jobs other than the “pre-disability” job.
- The principle of dignity with risk (*i.e.*, the ability of persons with disabilities to assume risk to themselves) has to be balanced with health and safety considerations.

As a result, there are several new features in these *Guidelines*. The reader will find references to case law and international human rights obligations, as well as a resource section.

The right to be accommodated and the corresponding duty of the employer and union are now well established in statute and case law. Accommodation is a fundamental and integral part of the right to equal treatment. The duty to accommodate means that the terms and conditions of the workplace, or the functions of a job, may have to be changed. The *Code* recognizes that an employer may have operating rules, policies and procedures that may be necessary for business reasons, or that there may be certain legal requirements, such as health and safety legislation. There may

also be collective agreements that set out the terms and conditions governing the workplace.

Accommodation with dignity is part of a broader principle, namely, that our society should be structured and designed for inclusiveness. This principle, which is sometimes referred to as integration, emphasizes barrier-free design and equal participation of persons with varying levels of ability. Integration is also much more cost effective than building parallel service systems, although it is inevitable that there will be times when parallel services are the only option. Inclusive design and integration are also preferable to “modification of rules” or “barrier removal”, terms that, although popular, assume that the *status quo* (usually designed by able-bodied persons) simply needs an adjustment to render it acceptable. In fact, inclusive design may involve an entirely different approach. It is based on positive steps needed to ensure equal participation for those who have experienced historical disadvantage and exclusion from society’s benefits.⁴ The right to equality can be breached by a failure to address needs related to disadvantage. As the Supreme Court of Canada has observed:

[T]he principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.⁵

This positive approach is more effective because it is accessible and inclusive from the start. Employers and others who set standards or requirements

owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace [or other] standards.⁶

A proactive approach to disability accommodation is therefore necessary.

Those responsible for accommodation⁷ should be aware of the standards for accommodation. The following guiding principles should be kept in mind:

- The needs of persons with disabilities must be accommodated in the manner that most respects their dignity, to the point of undue hardship.
- There is no set formula for accommodation — each person has unique needs and it is important to consult with the person involved.
- Taking responsibility and showing willingness to explore solutions is a key part of treating people respectfully and with dignity.

- Voluntary compliance may avoid complaints under the *Code*, as well as save the time and expense needed to defend against them.

1. What is Disability?

1.1 The Definition in the *Human Rights Code*

Section 10(1) of the *Code* defines “handicap” as follows:

“because of handicap” means for the reason that the person has or has had, or is believed to have or have had,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness, and without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental retardation or impairment,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

“Disability” should be interpreted in broad terms. It includes both present and past conditions, as well as a subjective component, namely, one based on perception of disability. Although sections 10(a) to (e) set out various types of conditions, it is clear that they are merely illustrative and not exhaustive. Protection for persons with disabilities under this section explicitly includes mental illness,⁸ developmental disabilities, and learning disabilities. Even minor illnesses or infirmities can be “disabilities”, if a person can show that she was treated unfairly because of the perception of a disability.⁹ Conversely, a person with an ailment who cannot show she was treated unequally because of a perceived or actual disability will be unable to meet even the *prima facie* test for discrimination. It will always be critical to assess the context of the differential treatment in order to determine whether discrimination has taken place, and whether the ground of disability is engaged.

1.2 A Broader Approach to Understanding Disability: A Social Perspective

The Supreme Court of Canada has recently shed new light on the approach to be taken in understanding disability. In *Mercier*,¹⁰ a case arising in Quebec, the Supreme Court made it clear that disability must be interpreted to include its subjective component, since discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations.

In *Mercier*, the complainants were denied employment or dismissed when it was discovered that they had medical conditions. However, their conditions did not result in any functional limitations. The employers argued that since the conditions did not give rise to any functional limitations, they could not be “disabilities” under Quebec’s human rights law. The Supreme Court of Canada disagreed.

The Court chose not to create an exhaustive definition of disability. Instead, it opted for an equality-based framework that takes into account evolving biomedical, social and technological developments. This includes a socio-political dimension that emphasizes human dignity, respect and the right to equality. Thus, a disability may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors. The focus is on the *effects* of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment.

Another Supreme Court of Canada decision¹¹ has since confirmed that “social handicapping”, *i.e.*, society’s response to a real or perceived disability, should be the focus of the discrimination analysis.

This approach is consistent with the *Code*, which includes past, present and perceived conditions. It affords a broad and liberal interpretation and promotes the objectives of the *Code*.

1.3 Non-Evident Disabilities

The nature or degree of certain disabilities might render them “non-evident” to others. Chronic fatigue syndrome and back pain, for example, are not apparent conditions. Other disabilities might remain hidden because they are episodic. Epilepsy is one example. Similarly, environmental sensitivities can flare up from one day to the next, resulting in significant impairment to a person’s health and capacity to function, while at other times, this disability may be entirely non-evident. Other examples might include:

- persons whose disabilities do not actually result in any functional limitations but who experience discrimination because others believe their disability makes them less able;
- persons who have recovered from conditions but are treated unfairly because of their past condition; and
- persons whose disabilities are episodic or temporary in nature.

Other disabilities may become apparent based on the nature of the interaction, such as when there is a need for oral communication with an individual who is deaf, or there is a need for written communication with an individual who has a learning disability. A disability might become apparent over time through extended interaction. It might only become known when a disability accommodation is requested or, simply, the disability might remain “non-evident” because the individual chooses not to divulge it for personal reasons.

Regardless of whether a disability is evident or non-evident, a great deal of discrimination faced by persons with disabilities is underpinned by social constructs of “normality” which in turn tend to reinforce obstacles to integration rather than encourage ways to ensure full participation. Because these disabilities are not “seen”, many of them are not well understood in society. This can lead to stereotypes, stigma and prejudice.

1.4 Mental Disability

Although mental disability is a form of non-evident disability, it raises particular issues that merit independent consideration. Over the years, many employers have expressed the need for specific guidance on the issue of mental disability. Section 10 of the *Code* expressly includes mental disabilities. Persons with mental disabilities face a high degree of stigmatization and significant barriers to employment opportunities.¹² Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the person's condition. It may also mean that someone who has a problem and needs help may not seek it, for fear of being labelled.

The Supreme Court of Canada has recognized the distinct disadvantage and negative stereotyping faced by persons with mental disabilities, and has held that discrimination against individuals with mental disabilities is unlawful. In *Gibbs v. Battlefords*¹³ the Court struck down an insurance plan for employees with disabilities that limited benefits for mental disabilities to a lower level as compared to physical disabilities. It is therefore the Commission's position that such distinctions are *prima facie* discriminatory.

2. *Prima Facie* Discrimination Because of Disability

Once a disability within the meaning of section 10 of the *Code* is established, the individual has the burden of showing a *prima facie* case of discrimination.

Discrimination under the *Code* can be direct (refusal to grant a job or provide access to services or housing, for example, because of a disability), indirect, constructive (adverse effect) or based on society's failure to accommodate actual differences.

In some cases, it will be clear that discrimination has occurred. In others, a preliminary assessment tool may be helpful. The Supreme Court of Canada has suggested three broad inquiries to determine if discrimination has taken place:¹⁴

(1) *Differential Treatment*

Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the complainant's already disadvantaged position within Canadian society?

(2) *An Enumerated Ground*

Was the differential treatment based on an enumerated ground?

(3) *Discrimination in a Substantive Sense*

Finally, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, an individual? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

Given the clear historical disadvantage experienced by persons with disabilities, it is likely that most differential treatment because of disability will result in a finding of *prima facie* discrimination.¹⁵ This would include not only unfair treatment because of disability, but also neutral factors or requirements that have an adverse impact on persons with disabilities. It would also include inappropriate responses, or a lack of response to the complainant's condition or stated need for accommodation.

2.1 Discrimination and Insurance

Discrimination may also take place where a term or condition of employment requires enrolment in a group insurance contract and an applicant does not qualify for the insurance plan because of disability. The term or condition of employment itself would be viewed as a violation of the *Code*.¹⁶

If an employee is excluded because of a disability from a benefit, pension or superannuation plan or fund or a contract of group insurance, an employer must compensate the employee an amount equivalent to the contribution that the employer would have otherwise made on behalf of an employee who does not have a disability.¹⁷

Compensation to employees takes on different forms, such as contributions to benefit premiums or accrual of vacation credits. Where employers, as a matter of course, pay a certain form of compensation to other employees who are absent from work, employees absent due to disability are also entitled to such compensation.¹⁸

3. The Duty to Accommodate

3.1 General Principles

3.1.1 *Respect for Dignity*

The duty to accommodate persons with disabilities means accommodation must be provided in a manner that most respects the dignity of the person, if to do so does not create undue hardship.¹⁹ Dignity includes consideration of how accommodation is provided and the individual's own participation in the process.

Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued.²⁰ Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well as to whether an accommodation maximizes integration and promotes full participation in society.

Different ways of accommodating the needs of persons with disabilities should be considered along a continuum from those ways which are most respectful of privacy, autonomy, integration and other human values, to those which are least respectful of those values.

Perhaps the most common example of an accommodation that demonstrates little respect for the dignity of a person with a disability is a wheelchair entrance over a loading dock or through a service area or garbage room. Persons with disabilities should have the same opportunity as others to enter

a building in a manner that is as convenient and pleasant for them as it is for others.

3.1.2 Individualized Accommodation

The essence of accommodating people with disabilities is individualization. As a result of the new three-step test proposed by the Supreme Court of Canada and re-affirmed by the Ontario Court of Appeal in *Entrop*,²¹ each person with a disability must be considered, assessed and accommodated individually.

Example: A corporate policy provides for obligatory termination in the event that an employee in a safety-sensitive position tests positive after a breathalyzer test. This blanket policy does not provide for individualized assessment or the appropriateness of the outcome in the circumstances and, accordingly, does not accommodate employees on an individual basis.

There is no set formula for accommodating people with disabilities. Each person's needs are unique and must be considered afresh when an accommodation request is made. A solution may meet one person's requirements but not another's, although it is also the case that many accommodations will benefit large numbers of persons with disabilities.

3.1.3 Integration and Full Participation

International human rights standards point to the importance of full participation and enjoyment of life for persons with disabilities. The United Nations' *Declaration of the Rights of Disabled Persons*²² provides in sections 3 and 8 that:

3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible. [. .]

8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

With these principles in mind, achieving integration and full participation for persons with disabilities requires barrier-free and inclusive designs and removal of existing barriers. Preventing and removing barriers means persons with disabilities should be able to access their environment and face the same duties and requirements as everyone else with dignity and without

impediment. Where barriers continue to exist because it is impossible to remove those barriers at a given point in time, then accommodation should be provided to the extent possible, short of undue hardship.

It is well established in human rights law that equality may sometimes require different treatment that does not offend the individual's dignity. In some circumstances, the best way to ensure the dignity of persons with disabilities may be to provide separate or specialized services. However, employment, housing, services and facilities must be built or adapted to accommodate individuals with disabilities in a way that promotes their integration and full participation. Segregated treatment in services, employment, or housing for individuals with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.²³

3.1.3(a) Design by Inclusion

Integration requires up-front barrier-free design and inclusion-by-design in order to fully integrate persons with disabilities into all aspects of society as much as possible.

This approach combats "social handicapping" and recognizes that social attitudes and actions often contribute to "handicaps": a person may have few or even no limitations other than those created by non-inclusive thinking. The Supreme Court has noted the need to "fine-tune" society so that structures and assumptions do not exclude persons with disabilities from participation in society²⁴ and it has more recently affirmed that standards should be designed to reflect all members of society, insofar as this is reasonably possible.²⁵

When constructing new buildings, undertaking renovations, purchasing new computer systems, launching new Web sites, setting up new policies and procedures, offering new services, or implementing new public transit routes, design choices should be made that do not create barriers for persons with disabilities.

Inclusive design is the approach that is most respectful of the dignity of persons with disabilities.

3.1.3(b) Removing Barriers

Persons with disabilities are currently excluded by many kinds of barriers, including physical, attitudinal and systemic ones. Significant changes are required as part of the duty to accommodate in order to provide equal access to employment (including collective agreements), transportation systems, buildings (except private residences), rental accommodation, services, restau-

rants, shopping centres, stores and other places and activities. These changes are necessary in order to give meaning to the right to equality and freedom from discrimination guaranteed to persons with disabilities under Part I of the *Code*.

A systemic barrier is not just a single rule or policy but a combination of policies and/or guidelines that result in the exclusion of people identified by a *Code* ground such as disability. Organizations should understand and be aware of the possibility that systemic barriers may exist within their organization and actively seek to identify and remove them.

Barrier removal maximizes integration with one's environment so ideally everyone is able to participate fully and with dignity. Identifying and removing systemic barriers also makes good business sense. It may reduce and prevent the filing of human rights complaints and can make facilities and procedures more comfortable for other groups such as seniors and for all people in general.

3.1.3(c) *Accommodating Remaining Needs*

Even up-front barrier-free or inclusive design and systematic removal of existing barriers may not result in full participation for persons with disabilities. At this point, differential treatment might be required in order to provide equal opportunity to full participation.

Again, accommodating remaining needs through differential treatment must be done in a manner that maximizes integration and dignity.

3.2 Legal Principles

Once a *prima facie* case of discrimination is found to exist, the legal burden shifts to the person responsible for accommodation to show that the discrimination is justifiable. The following sections will deal with the basic legal test that persons responsible for accommodation must meet, and with the shared responsibilities of all parties to the accommodation process.

Section 11 of the *Code*, combined with section 9, operates to prohibit discrimination that results from requirements, qualifications, or factors that may appear neutral but which have an adverse effect on persons with disabilities. This is often called "adverse effect", or "constructive" discrimination. Section 11 allows the person responsible for accommodation to demonstrate that the requirement, qualification or factor is reasonable and *bona fide* by showing that the needs of the group to which the complainant belongs cannot be accommodated without undue hardship.

Section 17 also creates an obligation to accommodate, specifically under the ground of disability. Section 17 states that a right is not infringed if the person with a disability is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right. However, this defence is not available unless it can be shown that the needs of the person cannot be accommodated without undue hardship.

Section 17 addresses two important differences between disability and other *Code* grounds.²⁶ Firstly, it recognizes that discrimination against persons with disabilities is not always grounded in negative stereotypes but rather can be based on society's failure to accommodate actual differences. Secondly, it emphasizes the need for individualized accommodation, because the ground of disability "*means vastly different things depending upon the individual and the context*".²⁷

The Ontario Court of Appeal has confirmed recently that both sections 11 and 17 apply to persons with disabilities.²⁸ However, as a result of two landmark decisions of the Supreme Court of Canada,²⁹ the distinction between direct discrimination and adverse effect discrimination has become of much less practical significance. The Ontario Court of Appeal has confirmed that this "unified approach" should be applied to Ontario human rights law as well.³⁰ The practical result is that in most cases of discrimination on the ground of disability, individualized accommodation will be necessary.

The Supreme Court of Canada sets out a framework for examining whether the duty to accommodate has been met.³¹ If *prima facie* discrimination is found to exist, the person responsible for accommodation must establish on a balance of probabilities that the standard, factor, requirement or rule

1. was adopted for a purpose or goal that is rationally connected to the function being performed;
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

As a result of this test, the rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.³²

The ultimate issue is whether the person responsible for accommodation has shown that accommodation has been provided up to the point of undue hardship. In this analysis, the procedure to assess accommodation is as important as the substantive content of the accommodation.³³

The following non-exhaustive factors should be considered in the course of the analysis:³⁴

- whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect;
- reasons why viable alternatives were not implemented;
- ability to have differing standards that reflect group or individual differences and capabilities;
- whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

3.3 Most Appropriate Accommodation

The duty to accommodate requires that the most appropriate accommodation be determined and then be undertaken, short of undue hardship. The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation, and ensures confidentiality.

Accommodation is a process and is a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. At one end of this continuum would be full accommodation that most respects the person's dignity. Next is phased-in accommodation over time, followed by the most appropriate accommodation only being implemented once sufficient reserve funds have been set aside. Alternative accommodation (that which would be less than "ideal") might be next on the continuum when the most appropriate accommodation is not feasible. Alternative accommodation might also be accomplished at a later date if immediate implementation would result in undue hardship. Or, alternative accommodation might be implemented as an interim solution while the most appropriate accommodation is being phased in or implemented at a later date.

Whether an accommodation is “appropriate” is a determination completely distinct and separate from whether the accommodation would result in “undue hardship” (the test that has to be met under sections 11 and 17(2) of the *Code*).

Accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual's disability-related needs. If the accommodation meets the individual's needs and does so in a way that most respects dignity, then a determination can be made as to whether or not this “most appropriate” accommodation would result in undue hardship.

An Ontario Board of Inquiry has ruled that short of undue hardship, the highest point in the continuum of accommodation must be achieved.³⁵ However, if there is a choice between two accommodations which are equally responsive to the person's needs in a dignified manner, then those responsible are entitled to select the one that is less expensive or that is less disruptive to the organization.

3.3.1 Essential Duties and the Current Job

The *Code* guarantees equal treatment to all persons capable of performing the essential duties or requirements of the job or service. No one can be judged incapable of performing those duties until efforts have been made to accommodate the individual up to the point of undue hardship. The first step is to separate the essential from the non-essential duties of the job. Where possible, non-essential tasks can be reassigned to another person. The person with the disability should then be assessed in terms of his or her ability to perform the essential duties and, on that basis, accommodation should be considered.

There is little guidance as to how to distinguish between essential duties and others. In one Ontario Board of Inquiry decision, the word “essential” was defined as follows:

“Essential” means that which is “needed to make a thing what it is; very important; necessary” — Synonyms are “indispensable, requisite, vital.” Thus, peripheral or incidental, non-core or non-essential aspects of a job are not pertinent to a determination under [section 17(1)].³⁶

Conclusions about inability to perform essential duties should not be reached without actually testing the ability of the person. It is not enough for the employer or person to assume that the person cannot perform an essen-

tial requirement. Rather, there must be an objective determination of that fact.³⁷

The duty to accommodate may require employers to consider modifying performance standards or productivity targets. The term "performance standard" refers broadly to qualitative or quantitative standards that may be imposed on some or all aspects of work, whether they are set by the employer or through collective bargaining. A productivity target is a performance standard that relates specifically to the output of work expected by the employer. Performance standards generally can be distinguished from qualification standards, which are the skills or attributes that one must have to be eligible for a particular job:

Production standards identify the level at which an employee must perform job functions in order to perform successfully. Qualification standards, on the other hand, identify the skills and abilities necessary to perform the functions at the required level.³⁸

The central issue in determining whether or how performance standards should be modified is whether the standards in question are essential duties or requirements within the meaning of section 17 of the *Code*. If the person is unable to perform the standard, but the standard is not considered an essential part of the job, it can be changed or the function removed from the employee altogether and reassigned.

If the standard is essential, the employer is nevertheless required to accommodate the employee under section 17(2) of the *Code*. Keeping in mind the overall objective of the inclusion of employees with disabilities in the workplace, sections 17 (1) and (2) of the *Code* together include an obligation on an employer to accommodate a person. This accommodation may include an adjustment of that performance standard so long as doing so does not result in undue hardship. If it does amount to undue hardship, the employer has a defence.

This does not preclude the employer from enforcing performance standards that are unrelated to the disability. The employer is entitled to a productive employee and to develop standards and targets that maximize organizational objectives.

3.3.2 Alternative Work

Although accommodation in the pre-disability job is always preferable, it may not always be possible. The issue of whether an employee is entitled to have access to a job other than the pre-disability job is a matter of some debate. Nothing in the *Code* or in section 17 specifically restricts the require-

ment to accommodate a worker with disability to the pre-disability position. Conversely, nothing in section 17 expressly authorizes it either. Nevertheless, in light of the broad and purposive interpretation that should be afforded to human rights legislation, it is the Commission's view that accommodation in a job other than the pre-disability job may be appropriate in some circumstances. Section 17 may therefore include access to alternative work. Some of the following considerations may assist employers in determining whether such accommodation is available under section 17(2).

The following questions should be considered:

- Is alternative work possible and available, at present or in the near future?
- If it is not available, can a new position be created without causing undue hardship?
- Does it require additional training and does the training impose undue hardship?
- Do the tasks performed match the job description, or is there flexibility in the workplace with regard to an employee's responsibilities?
- Does the alternative work policy contravene a collective agreement?
- What are the terms of the collective agreement or individual contract of employment?
- What are the past practices of the workplace? How interchangeable are workers? Do employees frequently change positions either permanently or temporarily for reasons other than disability accommodation?³⁹

Depending on how the previous questions are answered, accommodation may therefore include job restructuring, reassignment to open positions, retraining for alternative positions or job bundling, if that would not constitute undue hardship for the employer. This will depend on the circumstances of the employment and the labour environment at a given workplace. In the final analysis, the employee must be able to perform a useful and productive job for the employer.⁴⁰

Two of these options are discussed in the following sections.

3.3.2(a) *Temporary Alternative Work*

The term "alternative work" means different work or work that does not necessarily involve similar skills, responsibilities, and compensation. Tempo-

rary alternative work may be an appropriate accommodation either in a return-to-work context, or in a situation where a disability renders an employee temporarily unable to accomplish the pre-disability job.

Temporary alternative work can be an appropriate accommodation to assist an individual where the nature of the disability and its limitations are temporary or episodic.

3.3.2(b) *Permanent Alternative Work*

An employer-initiated alternative work arrangement must consider the circumstances of the individual's return to work. When an employee asks to be reinstated in a previous position, the employer may make the appropriate inquiries to assess whether the employee is fully able to carry out the essential functions of the job. Whenever possible, the returning employee should be given an opportunity to prove his or her ability to perform the pre-disability job.⁴¹

Where the employee can no longer perform his or her current job and if alternative work is appropriate based on the analysis described above, the Commission is of the view that the employer should consider permanent alternative work. This is consistent with a line of labour arbitration cases that have found that the duty to accommodate may include significant workplace reorganization,⁴² as well as with the obligation to provide suitable work in order to satisfy the duty to re-employ injured workers.⁴³

Reassignment to a vacant position should be considered an appropriate accommodation only when accommodation in the current position would cause undue hardship. The vacant position must be vacant within a reasonable amount of time, but the employer is not required to "promote" the employee. Reassignment is not available to job applicants. If reassignment creates a conflict because of a collective agreement, accommodation needs should prevail over the collective agreement. When reassignment takes place, the person must be qualified for the reassigned position. The vacant position must be equivalent to the current one, although a less equivalent position would be acceptable if no equivalent one exists.

3.3.3 *Return to Work*

Accommodating a person who has been absent from work may involve any of the above forms of accommodation but also raises unique issues. People who return to work after an absence related to a ground in the *Code* are protected by the *Code*.⁴⁴ They generally have the right to return to their jobs, and this is frequently referred to as the "pre-disability job". Both

employers and unions must co-operate in accommodating employees who are returning to work. Accommodation is a fundamental and integral part of the right to equal treatment in the return to work context.

The right to return to work for persons with disabilities only exists if the worker can fulfil the essential duties of the job after accommodation short of undue hardship.⁴⁵ If a person cannot fulfil the essential duties of the job, despite the employer's effort to accommodate short of undue hardship, there is no right to return to work. As noted in the preceding section, there may also be a right to alternative work.

Under the *Code*, there is no fixed rule as to how long an employee with a disability may be absent before the duty to accommodate has been met. This will depend on the ability of the employee to perform the essential duties of the job, considering the unique circumstances of every absence and the nature of the employee's condition, as well as circumstances in the workplace. Also important is the predictability of absence, both in regards to when it will end and if it may recur, and the frequency of the absence. The employee's prognosis and length of absence are also important considerations. It is more likely that the duty to accommodate will continue with a better prognosis, regardless of the length of absence.

The duty to accommodate does not necessarily guarantee a limitless right to return to work. On the other hand, a return-to-work program that relies on arbitrarily selected cut-offs or that requires an inflexible date of return may be challenged as a violation of the *Code*. Ultimately the test of undue hardship is the relevant standard for assessing return-to-work programs.

3.4 Duties and Responsibilities in the Accommodation Process

The accommodation process is a shared responsibility. Everyone involved should co-operatively engage in the process, share information, and avail themselves of potential accommodation solutions.

The *person with a disability* is required to:

- advise the accommodation provider of the disability (although the accommodation provider does not generally have the right to know what the disability is);
- make her or his needs known to the best of his or her ability, preferably in writing, in order that the person responsible for accommodation may make the requested accommodation;

- answer questions or provide information regarding relevant restrictions or limitations, including information from health-care professionals, where appropriate, and as needed;
- participate in discussions regarding possible accommodation solutions;
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability;
- meet agreed-upon performance and job standards once accommodation is provided;⁴⁶
- work with the accommodation provider on an ongoing basis to manage the accommodation process; and
- discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

The *employer* is required to:

- accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise;
- obtain expert opinion or advice where needed;
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated,⁴⁷ and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate;⁴⁸
- keep a record of the accommodation request and action taken;
- maintain confidentiality;
- limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request;
- grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language; and
- bear the cost of any required medical information or documentation. For example, doctors' notes and letters setting out accommodation needs, should be paid for by the employer.

Unions and professional associations are required to:

- take an active role as partners in the accommodation process;⁴⁹

- share joint responsibility with the employer to facilitate accommodation;⁵⁰ and
- support accommodation measures irrespective of collective agreements, unless to do so would create undue hardship.

The duty to accommodate a disability exists for needs that are known. Organizations and persons responsible for accommodation are not, as a rule, expected to accommodate disabilities of which they are unaware. However, some individuals may be unable to disclose or communicate their needs because of the nature of their disability. In such circumstances, employers should attempt to assist a person who is clearly unwell or perceived to have a disability, by offering assistance and accommodation. On the other hand, employers are not expected to diagnose illness or “second-guess” the health status of an employee.

Example: An employer is unaware of an employee's drug addiction but perceives that a disability might exist. The employer sees that the employee is having difficulty performing, and is showing signs of distress. If the employer imposes serious sanctions or terminates the employee for poor performance, without any progressive performance management and attempts to accommodate, these actions may be found to have violated the *Code*.⁵¹

Before terminating or sanctioning an employee for “unacceptable behaviour”, an employer might first consider whether the actions of the employee are caused by a disability, especially where the employer is aware or perceives that the employee has a disability. Employers should always inform all employees that a disability-related assessment or accommodation can be provided as an option to address performance issues. Progressive performance management and discipline as well as employee assistance supports ensure that all employees have a range of opportunities to address performance issues on an individualized basis before sanctions or termination are considered. For example, severe change in an employee's behaviour could signal to an employer that the situation warrants further examination.

Mental illness should be addressed and accommodated in the workplace like any other disability. In some cases, an employer may be required to pay special attention to situations that could be linked to mental disability. Even if an employer has not been formally advised of a mental disability, the perception of such a disability will engage the protection of the *Code*. Prudent employers should try to offer assistance and support to employees before imposing severe sanctions. It should be borne in mind that some mental illnesses may render the employee incapable of identifying his or her needs.

Example: John has bipolar disorder, which he has chosen not to disclose to his employer because he is concerned about how he would be treated at work if it were known that he had a mental disability. He experiences a crisis at work, followed by a failure to appear at work for several days. The employer is concerned about John's absence and recognizes that termination for failure to report to work may be premature. The employer offers John an opportunity to explain the situation after treatment has been received and the situation has stabilized. Upon learning that a medical issue exists, the employer offers assistance and accommodation.

Once disability-related needs are known, the legal onus shifts to those with the duty to accommodate. For example, counselling or referral through Employee Assistance Programs (EAPs) could be the solution for an underlying disability that might be aggravated by workplace or personal stress.

There may be instances where there is a reasonable and *bona fide* basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided. In such cases, the accommodation provider may request confirmation or additional information from a qualified health-care professional in order to obtain the needed information. No one can be forced to submit to an independent medical examination, but failure to respond to reasonable requests may delay the provision of accommodation until such information is provided.

3.4.1 Confidentiality

Persons with disabilities are not necessarily required to disclose private or confidential matters, and should disclose information to the accommodation provider only as it pertains to the need for accommodation and any restrictions or limitations.

Example: An employee with AIDS has provided documentation to demonstrate her need for a flexible schedule and rest periods to manage periods of fatigue, and time to attend appointments with health care professionals. However, it is not necessary for the employee to disclose that she has AIDS. The employer is entitled to know that the employee has a disability and that she needs certain accommodations in order to remain productive at work.

Maintaining confidentiality for individuals with mental illness may be especially important because of the strong social stigmas and stereotyping that still persist about such disabilities.

Documentation supporting the need for particular accommodation (flexible hours, a different supervisor, a particular technical aid, for example) should be provided only to those who need to be aware of the information. It may be preferable in some circumstances for information to be provided to the company's health department or human resources staff rather than directly to the supervisor, so as to further protect confidentiality. Medical documentation should be kept separate from the person's corporate file.

4. Undue Hardship

The *Code* prescribes three considerations in assessing whether an accommodation would cause undue hardship. These are:

- cost;
- outside sources of funding, if any; and
- health and safety requirements, if any.

Accommodating someone with a disability is seldom as expensive or difficult as is sometimes imagined. Over two-thirds of job accommodations cost under \$500; many cost nothing at all.⁵²

The *Code* sets out only three considerations. This means that no other considerations, other than those that can be brought into those three standards, can be properly considered under Ontario law. There have been cases originating from other jurisdictions or from Ontario prior to the amendment of the *Code* that have included such other factors as employee morale, or conflict with a collective agreement. However, the Ontario legislature has seen fit to enact a higher standard by specifically limiting undue hardship to three particular components. The broad and purposive interpretation of the *Code* and human rights generally means that rights must be construed liberally and defences to those rights should be construed narrowly.⁵³ Moreover, the *Code* has primacy over legislation⁵⁴ and also prevails over agreements such as collective agreements.⁵⁵

Several factors are therefore excluded from considerations that are frequently raised by respondents. These are business inconvenience, employee morale, customer preference, and collective agreements or contracts.⁵⁶

4.1 Excluded Factors

4.1.1 Business Inconvenience

"Business inconvenience" is not a defence to the duty to accommodate. If there are demonstrable costs attributable to decreased productivity, efficiency or effectiveness, they can be taken into account in assessing undue

hardship under the cost standard, providing they are quantifiable and demonstrably related to the proposed accommodation.

4.1.2 Employee Morale

In some cases, accommodating an employee may generate negative reactions from co-workers who are either unaware of the reason for the accommodation or who believe that the employee is receiving an undue benefit. The reaction may range from resentment to hostility. However, the person responsible for providing accommodation should ensure that staff are supportive and are helping to foster an environment that is positive for all employees. It is not acceptable to allow discriminatory attitudes to fester into workplace hostilities that poison the environment for disabled workers.

Moreover, individuals with disabilities have a right to accommodation with dignity. It is an affront to an individual's dignity if issues of morale and misconception stemming from perceived unfairness are not prevented or dealt with. In such cases, those responsible will not have met their duty to provide accommodation with dignity.

4.1.3 Third-Party Preference

Human rights case law notes that third-party preferences do not constitute a justification for discriminatory acts, and the same rule applies to customer preferences.⁵⁷

4.1.4 Collective Agreements or Contracts

Collective agreements or other contractual arrangements cannot act as a bar to providing accommodation. The Courts have determined that collective agreements and contracts must give way to the requirements of human rights law. To allow otherwise would be to permit the parties to contract out of their *Code* rights under the auspices of a private agreement. Accordingly, subject to the undue hardship standard, the terms of a collective agreement or other contractual arrangement cannot justify discrimination that is prohibited by the *Code*.

A union may cause or contribute to discrimination by participating in formulating a work rule, e.g., a provision in the collective agreement that has a discriminatory effect.⁵⁸ Unions and employers are jointly responsible for negotiating collective agreements that comply with human rights laws. They should build conceptions of equality into collective agreements.⁵⁹

Example: When a union and employer are negotiating a collective agreement, the principle of seniority is maintained as a general prin-

ciple. However, the union and employer can together address how employees with disabilities will be accommodated.

However, if an employer and a union cannot reach an agreement on how to resolve an accommodation issue, the employer must make the accommodation in spite of the collective agreement. If the union opposes the accommodation, or does not co-operate in the accommodation process, then the union may be named as a respondent in a complaint filed with the Commission.

Unions will have to meet the same requirements of demonstrating undue hardship having regard to costs, and health and safety. For example, if the disruption to a collective agreement can be shown to create direct financial costs, this can be taken into account under the cost standard. Issues surrounding terms of a collective agreement relating to health or safety are dealt with under the section dealing with Health and Safety.

In non-unionized environments, employers can make flexible employment arrangements to meet their duty to accommodate. The same sort of flexible employment arrangements should be considered in unionized environments, although they may fall outside the collective agreement where the duty to accommodate arises.

4.2 Onus of Proof and Objective Evidence

In order to claim the undue hardship defence, the person who is responsible for making the accommodation has the onus of proof.⁶⁰ It is not up to the person with a disability to prove that the accommodation can be accomplished without undue hardship.

The nature of the evidence required to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable. The person responsible for accommodation must provide facts, figures, and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is "too high" based on impressionistic views or stereotypes will not be sufficient.⁶¹

Example: A deaf patient requires a sign language interpreter in a hospital. The hospital administrator refuses to provide the accommodation, stating "If everyone wanted signers, it would bankrupt us." The hospital administrator does not provide financial information to justify this claim, nor does he provide demographic evidence to show the likely number of patients who may require signers. As a result, the hospital's defence will be unlikely to succeed.

Objective evidence includes, but is not limited to:

- financial statements and budgets;
- scientific data, information and data resulting from empirical studies;
- expert opinion;
- detailed information about the activity and the requested accommodation; and
- information about the conditions surrounding the activity and their effects on the person or group with a disability.

4.3 Elements of the Undue Hardship Defence

4.3.1 Cost

The Supreme Court of Canada has said that, "*one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment*".⁶² The cost standard is therefore a high one.

Costs will amount to undue hardship if they are:

- quantifiable;
- shown to be related to the accommodation; and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

This test will apply whether the accommodation will benefit one individual or a group.

The costs that remain after all costs, benefits, deductions and other factors have been considered will determine undue hardship.

All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account. However, mere speculation, for example, about monetary losses that may follow the accommodation of the person with a disability, will not generally be persuasive.

The financial costs of the accommodation may include:

- capital costs, such as the installation of a ramp, the purchase of screen magnification or software;
- operating costs such as sign-language interpreters, personal attendants or additional staff time;

- costs incurred as a result of restructuring that are necessitated by the accommodation; and
- any other quantifiable costs incurred directly as a result of the accommodation.

Concerns may arise about the potential increase in liability insurance premiums by the perceived health and safety risks of having persons with disabilities on particular job sites.

Increased insurance premiums or sickness benefits would be included as operating costs where they are quantified, such as actual higher rates (not hypothetical), and are shown not to be contrary to the principles in the *Code* with respect to insurance coverage.⁶³ Where the increased liability is quantifiable and provable, and where efforts to obtain other forms of coverage have been unsuccessful, insurance costs can be included.

For the purposes of determining whether a financial cost⁶⁴ would alter the essential nature or substantially affect the viability of the organization, consideration will be given to:

- the ability of the person responsible for accommodation to recover the costs of accommodation in the normal course of business (see section 4.4.1);
- the availability of any grants, subsidies or loans from the federal, provincial or municipal government or from non-government sources which could offset the costs of accommodation;
- the ability of the person responsible for accommodation to distribute the costs of accommodation throughout the whole operation (see section 4.4.2);
- the ability of the person responsible for accommodation to amortize or depreciate capital costs associated with the accommodation according to generally accepted accounting principles; and
- the ability of the person responsible for accommodation to deduct from the costs of accommodation any savings that may be available as a result of the accommodation, including:
 - tax deductions and other government benefits (see section 4.4.4);
 - an improvement in productivity, efficiency or effectiveness (see section 4.4.5);
 - any increase in the resale value of property, where it is reasonably foreseeable that the property might be sold;
 - any increase in clientele, potential labour pool, or tenants; and

— the availability of the Workplace Safety and Insurance Board's *Second Injury and Enhancement Fund*⁶⁵ (see section 4.4.6).

Larger organizations, including businesses and governments, may be in a better position to set an example or provide leadership in accommodating persons with disabilities. Accommodation costs will likely be more easily absorbed by larger organizations. Large employers, for example, are more likely to have the opportunities and the means to provide employment opportunities for greater numbers of persons with disabilities in a manner that accommodates their needs.

The phrase "benefits of enhancing equality" is intended to include consideration of benefits from the accommodation which may accrue to a person's co-workers, family, friends, fellow students, or the general public by the accommodation being made.

Heritage Buildings

The accessibility of heritage buildings raises controversial issues. A general exemption from accessibility requirements for heritage properties is not included in the *Policy* because it would result in broad exclusions as more and more buildings gain protection because of their heritage status. In a situation involving a heritage property, it is recognized that the cost of making the proposed accommodation may be increased by the necessity to preserve defining historic design features. However, aesthetic features, in and of themselves, that are not historic design features, are not to be included in the assessment.

The test of altering the essential nature or substantially affecting the viability of the enterprise allows the preservation of the defining features of a heritage property to be taken into account as a justifiable factor in assessing undue hardship.

4.3.2 Outside Sources of Funding

The availability of outside sources of funding may alleviate accommodation costs.⁶⁶ Organizations can make use of outside resources in order to meet their duty to accommodate and must first do so before claiming undue hardship.

There are three potential sources of funding to consider:

1. *Funds that may be available to the individual only, provided through government programs and that are linked to the individual's disability*

Resources, such as services or programs, might be available to accommodate the needs of persons with disabilities that could also aid them at work, in their apartment or while accessing a service.

Persons with disabilities might be expected to first avail themselves of outside resources available to them when making accommodation requests to an employer or service provider. However, such resources should most appropriately meet the accommodation needs of the individual, including respect for dignity.

2. *Funds that would assist employers and service providers defray the cost of accommodation*

Other outside accommodation resources might be available to an individual with a disability when more than one organization has an overlapping or interconnected sphere of responsibility for the duty to accommodate.

Example: A lawyer who is deaf, and who works for a large law firm, receives real-time captioning or sign language interpreter accommodation funded and provided by a court. While the lawyer is acting in court, the court takes responsibility for the duty to accommodate, relieving the lawyer's employer of its responsibility during this time period only.

3. *Funding programs to improve accessibility for persons with disabilities — a corporate or organizational responsibility*

Governments have a positive duty to ensure that services generally available to the public are also available to persons with disabilities. Governments should not be allowed to evade their human rights responsibilities by delegating implementation of their policies and programs to private entities.⁶⁷ An organization that assumes responsibility for a government program must attend to the accommodation needs of its users.

4.3.3 Health and Safety

Health and safety requirements may be contained in a law or regulation, or result from rules, practices or procedures that have been established independently or in conjunction with other businesses or services engaged in similar kinds of activity.

Organizations have a responsibility to undertake health and safety precautions that would ensure that the health and safety risks in their facilities or

services are no greater for persons with disabilities than for others. Where a health and safety requirement creates a barrier for a person with a disability, the accommodation provider should assess whether the requirement can be waived or modified. If waiving the health and safety requirement is likely to result in a violation of the *Occupational Health and Safety Act (OHSA)*, the employer should generate alternative measures based on the equivalency clauses of the *OHSA*.⁶⁸ The employer is required to show an objective assessment of the risk as well as demonstrate how the alternative measure provides equal opportunity to the person with a disability. The employer might be able to claim undue hardship after these measures were undertaken and a significant risk still remains.

4.3.3(a) *Bona fide and Reasonable Requirements*

Health and safety risks will amount to undue hardship if the degree of risk that remains after the accommodation has been made outweighs the benefits of enhancing equality for persons with disabilities. The person responsible for accommodation will have to satisfy the three-step test set out in Section 3.2.

Health and safety standards that are genuinely adopted for the protection of workers, clients or the public will usually meet the second step of the test. On the other hand, a standard that is established to circumvent human rights legislation will not meet this test.

The third step requires the organization to demonstrate that the standard is reasonably necessary and that accommodation cannot be accomplished without incurring undue hardship.

Health or safety risks that result in undue hardship could be reduced to acceptable levels over time, for example, by adding safety features, or changing job descriptions to accommodate an employee with a disability. Development of a new technology to allow an employee with a disability to operate certain machinery more safely, for example, may take some time. In principle, therefore, a person responsible for accommodation could be required to phase in an accommodation that would lessen the health or safety risk over time, provided that the delay is reasonable and justified in relation to the development time attributed to the accommodation.

4.3.3(b) *Assumption of Risk*

A person with a disability may wish to assume a risk. The risk created by modifying or waiving a health and safety requirement is to be weighed against the right to equality of the person with a disability. Where the risk is so

significant as to outweigh the benefits of equality, it will be considered to create undue hardship.

In determining whether an obligation to modify or waive a health or safety requirement, whether established by law or not, creates a significant risk to any person, consideration will be given to:

- the significance, probability and seriousness of the risk;
- the other types of risks that the person responsible for accommodation is assuming within the organization; and
- the types of risks tolerated within society as a whole, reflected in legislated standards such as licensing standards, or in similar types of organizations.

The "risk" that remains after all precautions including accommodations (short of undue hardship based on cost) have first been made to reduce the risk will determine undue hardship.

Where a modification or waiver of a health and safety requirement could place an individual with a disability at risk, the person responsible for accommodation is obliged to explain the potential risk to the individual. Where possible, persons with disabilities should be allowed to assume risk with dignity, subject to the undue hardship standard. At the same time, the organization has an obligation under health and safety legislation not to place individuals in a situation of direct threat of harm. High probability of substantial harm to anyone will constitute an undue hardship.

SERIOUSNESS OF THE RISK

The fact that a person has a disability, in and of itself, is not sufficient to establish that there is a risk. Evidence will be required to prove the nature, severity, probability and scope of the risk.

In determining the seriousness or significance of a risk, the following factors should be considered:

- the nature of the risk
 - what could happen that would be harmful?
- the severity of the risk
 - how serious would the harm be if it occurred?
- the probability of the risk
 - how likely is it that the potential harm will actually occur?
 - is it a real risk, or merely hypothetical or speculative?
 - could it occur frequently?

- the scope of the risk
 - who will be affected by the event if it occurs?

These five factors should be considered together to determine the seriousness of the risk. If the potential harm is minor and not very likely to occur, the risk should not be considered to be serious. A risk to public safety shall be considered as part of the scope of the risk, while the likelihood that the harmful event may occur would be considered as part of the probability of risk.

The seriousness of the risk is to be determined after accommodation and on the assumption that suitable precautions have been taken to reduce the risk.

Example: An ambulance dispatcher with a hearing impairment manages emergency calls over the telephone. Her capacity to do so safely and reliably is properly assessed while using a prescribed hearing aid and a hearing-aid-compatible telephone.

CONSIDERATION OF OTHER TYPES OF RISK

When assessing the seriousness of the risk posed by the obligation to modify or waive a health or safety requirement, consideration must be given to the other types of risks that are assumed within an organization. For example, many jobs have risks that are inherent to the nature of the work itself.

As well, job applicants may be denied employment on the basis of limitations related to their disabilities. Yet these same or similar limitations may be developed by employees who have been on the job for several years, with little or no effect on their ability to satisfactorily perform their duties and with no impact on their careers.

EVERYDAY RISK

Many sources of risk exist in the workplace, aside from those risks that may result from accommodating an employee with a disability. All employees assume everyday risks that may be inherent in a work site, or in working conditions, or which may be caused by a co-worker's fatigue, temporary inattentiveness, or stress. Employers have recognized that not all employees are 100% productive every day, and many provide counselling programs or other means of coping with personal problems, emotional difficulties or other problems that may arise. Risks created by these situations are factored into the level of safety or risk that we all accept in our lives every day.

A potential risk that is created by accommodation should be assessed in light of those other, more common sources of risk in the workplace.

RISKS IN SOCIETY AS A WHOLE

Risks that are present in comparable enterprises or in society as a whole should be considered. While maximizing safety is always desirable, as a society we constantly balance the degree of safety to be achieved against competing benefits. For example, we balance the risk of injury in contact sports against the benefits of participating in sports activities or because of the economic and entertainment benefits. We balance the risks involved in permitting higher speed limits against the benefits of increasing the efficient flow of traffic. We balance the risks involved in driving affordable cars against the costs that would be involved in making them even safer.

4.4 Minimizing Undue Hardship

The following factors and strategies must be considered in order to avoid undue hardship and meet the duty to accommodate under the *Code*:

4.4.1 Cost Recovery

Persons responsible for accommodation should take steps to recover the costs of accommodation. For example, by making reasonable changes to business practices or obtaining grants or subsidies, the expense of making accommodation can be offset. If the person responsible for accommodation believes that such measures will not be effective in avoiding undue hardship, s/he will have to demonstrate that such steps to recover costs are inadequate in the circumstances, are impossible, or will not yield the needed resources.

In other words, the person responsible for accommodation would be required to establish that the costs, which remain after steps are taken to recover costs, will alter the essential nature or substantially affect the viability of the enterprise.

4.4.2 Distributing Costs

Costs of accommodation must be distributed as widely as possible within the organization responsible for accommodation so that no single department, employee, customer or subsidiary is burdened with the cost of an accommodation. The appropriate basis for evaluating the cost is based on the budget of the organization as a whole, not the branch or unit in which the person with disability works or to which the person has made an application. In the case of government, the term "whole operation" should refer to the programs and services offered or funded by the government. There may be accommodations that require substantial expenditure, which, if implemented immediately, would alter the essential nature of government programs or

substantially affect their viability in whole or in part. In such instances, it may be necessary to implement the required accommodation incrementally.

4.4.3 Reducing Financial Burden

Organizations should consider spreading the financing of accommodation over time by taking out loans, issuing shares or bonds, or other business methods of financing. Amortization or depreciation is another means that an organization might be expected to use to reduce the financial burden, where possible.

4.4.4 Tax Deductions

Tax deductions or other government benefits flowing from the accommodation will also be taken into account as offsetting the cost of accommodation.

4.4.5 Improvements to Productivity, Efficiency, or Effectiveness

The person responsible for accommodation is expected to consider whether accommodation of the needs of a person with a disability may improve productivity, efficiency or effectiveness, expand the business, or improve the value of the business or property.

Example: An accommodation that affects a significant number of people with disabilities, such as persons requiring wheelchair access, could open up a new market for a storekeeper or a service provider. By building a ramp, several more persons will be able to access a store.

4.4.6 Second Injury and Enhancement Fund⁶⁹

The effects of the Second Injury and Enhancement Fund of the Workplace Safety and Insurance Board (the "WSIB") must be considered. In the event of an injury to a worker, where the injury is caused by the worker's disability, a claim may be made against this fund even if the employer did not have knowledge of the employee's pre-existing condition. The rates for the employer will not be increased as a result of making claims on the fund.

Approximately 90% of employees in the province of Ontario are under the protection of the WSIB. Since the fund is available to most employers, there will be few instances where increased liability insurance premiums for risk of injury to a person due to a pre-existing condition or disability will be a factor in creating undue hardship.

4.4.7 Creative Design Solutions

Creative design solutions can often avoid expensive capital outlay. This may involve specifically tailoring design features to the individual's functional capabilities. Design solutions must be most respectful of dignity.

4.4.8 A Less Expensive Alternative

Where undue hardship is claimed, cost and risk estimates should be carefully examined to ensure that they are not excessive in relation to the stated objective. If so, a determination should be made as to whether a less expensive or lower-risk alternative exists which could accomplish the accommodation (either as an interim measure to a phased-in solution or permanently) while still fully respecting the dignity of the person with a disability.

4.4.9 Phasing-in Accommodation

Some accommodations will be very important but will be difficult to accomplish in a short period of time.

Example: A small municipality may be able to show that to make its community centre or transportation system accessible in a single year would cause undue hardship. Or, a small employer may find it impossible to make its entrance and washroom facilities accessible immediately without undue hardship.

In these situations, undue hardship should be avoided by phasing in the accessible features gradually.

Some accommodations will benefit large numbers of persons with disabilities, yet the cost may prevent them from being accomplished. One approach, which may reduce the hardship, is to spread the cost over several years by phasing in the accommodation gradually.

Example: A commuter railroad might be required to make a certain number of stations accessible per year.

In many cases, while accommodation is being phased in over an extended period of time it may still be possible to provide interim accommodation for the individual. If both short and long-term accommodation can be accomplished without causing undue hardship, then both should be considered simultaneously.

4.4.10 Establishing a Reserve Fund

A second method of reducing the impact of the cost of an accommodation is to establish a reserve fund into which the person responsible for

accommodation makes payment under specified conditions. One of the obvious conditions should be that the reserve fund is to be used only to pay for accommodation costs in the future. Accommodations could gradually be accomplished by expenditures out of the reserve fund or could eventually be accomplished once enough funds had been set aside.

A reserve fund should not be considered as an alternative to a loan where the accommodation could be made immediately and the cost paid back over time. Rather, the reserve fund is to be used in circumstances where it would create undue hardship for the person responsible for accommodation to obtain a loan and accomplish the accommodation immediately. The reserve fund is one of several financing options to be considered in assessing the feasibility of an accommodation. If a reserve fund is to be established, provision should be made for considering future changes in circumstances.

Both phasing in and the establishment of a reserve fund are to be considered only after the person responsible for accommodation has demonstrated that the most appropriate accommodation could not be accomplished immediately. Phasing in is to be preferred to the establishment of a reserve fund wherever possible.

4.4.11 *Assessing the Impact of Remaining Costs*

After all costs, benefits deductions, outside sources of funding, and other factors have been considered, the next step is to determine whether the remaining (net) cost will alter the essential nature or affect the viability of the organization responsible for making the accommodation.

The person responsible for accommodation would need to show how it would be altered or its viability affected. It will not be acceptable for the person responsible for accommodation to merely state, without evidence to support the statement, that the company operates on low margins and would go out of business if required to undertake the required accommodation.

Finally, if undue hardship can be shown, the person with a disability should be given the option of providing or paying for that portion of the accommodation that results in undue hardship.

4.4.12 *Expert Assessment*

Where an undue hardship analysis anticipates assessing substantial capital or operating expenditures or procedural changes — for example, in making physical alterations to an apartment building, work site, vehicle or equipment or changing health and safety requirements — it might be advis-

able for the person responsible for accommodation to obtain a proposal and estimate from experts in barrier-free design and construction.

5. Accommodation Planning and Implementation

The best defence against human rights complaints is to be fully informed and aware of the responsibilities and protections included in the *Code*. Organizations can achieve this by developing disability accommodation policy and procedures as well as by conducting an accessibility review.

5.1 Organizational Policy

Organizations are responsible for dealing effectively, quickly and fairly with situations involving claims of harassment or discrimination. Organizations can be held liable by a court or tribunal if they or responsible staff members do not act to end discrimination or harassment in their workplaces.

When an act of harassment or discrimination or a need for accommodation is ignored, there are costs in terms of low morale, high stress, damaged professional reputations and employee absences.

Developing internal anti-discrimination policies and procedures to resolve complaints as part of a broad program to build a harassment-free and discrimination-free environment offers many benefits. Dealing promptly with these issues saves time and money. Letting people know the rules and defining unacceptable forms of behaviour makes it possible to avoid costly and upsetting hours in the courts or before specialized tribunals. In that way, strong policies and programs that prevent human rights complaints and help an organization effectively meet its duty to accommodate make good business sense.

The following should be part of any complete strategy to resolve human rights issues that arise in the workplace:

- anti-harassment or anti-discrimination policy;
- disability accommodation policy;
- a complaint-resolution procedure; and
- ongoing education programs.

These elements should be developed in co-operation with the union or other workplace or organizational partners.

A disability accommodation policy should:

- outline rights and responsibilities;
- require barrier analysis and prevention;

- prepare and document accommodation plans; and
- monitor and evaluate implementation.

5.2 Accessibility Review

Organizations should consider developing accessibility review plans, undertaking reviews and implementing the necessary changes to make facilities, procedures and services accessible to employees, members, tenants, clients or customers with disabilities.

Conducting the accessibility review will show to what extent an organization is accessible to persons with disabilities and what needs to be done.

An accessibility review plan should:

- state the purpose of the review plan along with a rationale, context and guidance for conducting a review;
- acknowledge an organization's obligations under the *Code* to ensure accessibility for employees, clients or customers with disabilities;
- identify internal and external resources that would provide guidance for conducting the review;
- summarize current internal and external initiatives;
- identify quality service measures;
- outline the scope of the review and identify potential barriers as they may relate to procedures and practices, facilities, services and communications;
- outline timeframes and responsibilities around conducting an accessibility review of the organization;
- outline a communications plan for the accessibility review so that senior management, staff, members, clients, *etc.*, are aware and supportive of the initiative and its purpose.

Results of the accessibility review should be documented in a Summary of Findings and Recommendations Report and submitted to senior management. Senior management should make the results available to all concerned along with a plan for undertaking barrier-removal.

Accessibility review plans and barrier removal are up-front ways that an organization can address the needs of persons with disabilities. Developing and using a disability accommodation policy will also help an organization meet its duty to accommodate the individual needs of employees and customers with disabilities in accordance with the *Code*. Such a policy will make

it clear to both employees with disabilities, others who require accommodation, and managers responsible for providing accommodation what company procedures are in place to assist persons with disabilities effectively.

ENDNOTES

¹ R.S.O.1990, c. H.19.

² The terms "disability" and "person with a disability" are used throughout this document instead of "handicap" or "handicapped person". Although the term "handicap" is used in the *Code*, many people with disabilities prefer the term "disability".

³ During consultations held in 1999 by the Ontario Human Rights Commission, stakeholders highlighted the particular issues facing educational institutions and those persons seeking access to them. Many of the principles set out in this Policy apply to service sectors as well, but the Commission will be undertaking new *Guidelines* for the educational sector in order to address these concerns.

⁴ In *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 (18 May 2000), online: Supreme Court of Canada <http://www.lexum.umontreal.ca/csc-scc/en/index.html> [hereinafter "*Granovsky*"], the Supreme Court recognized that the primary focus in the disability analysis is on the inappropriate legislative or administrative response (or lack thereof) of the State (at para. 39). The Court states (at para. 33):

Section 15(1) ensures that governments may not, intentionally or *through a failure of appropriate accommodation*, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied. [emphasis added.]

Although in *Granovsky* the focus was State action, similar principles apply to persons responsible for accommodation under human rights law.

⁵ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 78, online: <http://www.lexum.umontreal.ca/csc-scc/en/index.html> [hereinafter "*Eldridge*"].

⁶ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 68 [hereinafter "*Meiorin*"].

⁷ The term "person (or organization or company) responsible for accommodation" includes individuals, partnerships, corporations, companies, unions, joint ventures and organizations. More than one "person" may be responsible for accommodation, and where this term is used, it refers to all parties who are obliged to take part in the accommodation.

⁸ Mental illness has been described as "significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behavioural dysfunction, or a combination of these." See Canadian Psychiatric Association, *Mental Illness and Work* (brochure), online: Canadian Psychiatric Association homepage <http://cpa.medical.org/MAIW/MAIW.asp> at pg. 1.

⁹ The *Code*'s definition of "handicap" includes perceived handicap.

¹⁰ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 (3 May 2000), online: Supreme Court of Canada <http://www.lexum.umontreal.ca/csc-scc/en/index.html> [hereinafter "*Mercier*"].

¹¹ *Granovsky*, *supra* note 4.

¹² *Mental Illness and Work*, *supra* note 8.

¹³ *Gibbs v. Battlefords and Dist. Co-operative Ltd.* (1996), 27 C.H.R.R. D/87 (S.C.C.).

¹⁴ This was first articulated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, online: Supreme Court of Canada <http://www.lexum.umontreal.ca/csc-scc/en/index.html> (date accessed: 4 August 2000) [hereinafter "*Law*"]. The approach has been affirmed in several subsequent cases, most notably two cases dealing with discrimination on the basis of disability: *Mercier*, *supra* note 10 and *Granovsky*, *supra* note 4.

¹⁵ The facts of *Granovsky*, *supra* note 4, illustrate an exception to this general proposition. Where a scheme targets a particular group, for example, those who are less fortunate than the complainant, it is unlikely to be considered discriminatory to exclude more advantaged groups.

¹⁶ Section 25(1) of the *Code*.

¹⁷ Section 25(4) of the *Code*.

¹⁸ Conversely, in *O.N.A. v. Orillia Soldiers Memorial Hospital* (1999), 169 D.L.R. (4th) 489, leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 118, online: QL (SCCA) [hereinafter "*Orillia*"], nurses on unpaid leave of absence due to disability did not accumulate service after periods set out in the collective agreement, and the employer was not required to contribute premiums to employee benefit plans after the employees had received long-term disability payments for a specified time. The Ontario Court of Appeal held that there was no contravention of the *Code* because these nurses were not treated differently from those in the appropriate comparator group, namely employees who were not working for other reasons.

¹⁹ The Supreme Court's recent decisions in *Law*, *supra* note 14, and *Granovsky*, *supra* note 4, have confirmed that the concept of human dignity is central to discrimination analysis. These cases indicate that if an accommodation marginalizes, stigmatizes or demeans the person with a disability's sense of worth or dignity as a human being, it will not be appropriate. In commenting on the *Eaton* case, the Court said in *Granovsky*, *supra* note 4, at para. 74:

... Emily's claim might have succeeded if ... the Court had been persuaded that the Board's response to the challenge posed by Emily's placement [the accommodation] *had itself violated Emily's dignity as a human being equally deserving of consideration*, or placed discriminatory obstacles in the way of her self-fulfillment. [Emphasis added.]

²⁰ *Law*, *supra* note 14 at para. 53.

²¹ *Entrop v. Imperial Oil Limited* (21 July 2000), Docket C29762 at para. 77-81 (Ont. C.A.), online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca> [hereinafter "*Entrop*"].

²² United Nations, Declaration of the Rights of Disabled Persons, proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975.

²³ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [hereinafter "*Eaton*"]. The Supreme Court stated that "*integration should be recognized as the norm of general application because of the benefits it generally provides*" (at para. 69), however, the Court found that in Emily Eaton's circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

²⁴ *Eaton*, *ibid* at para. 67.

²⁵ *Meiorin*, *supra* note 6, at para. 68.

²⁶ *Eaton*, *supra* note 23, at para. 66-7. The unique nature of disability has been recognized by the Supreme Court of Canada.

²⁷ *Ibid.*, at para. 69.

²⁸ *Supra*, note 21.

²⁹ *Meiorin*, *supra* note 6, and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [hereinafter "*Grismer*"].

³⁰ *Entrop v. Imperial Oil Limited* (21 July 2000), Docket C29762 at para. 77-81 (Ont. CA), online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca> [hereinafter "*Entrop*"].

³¹ *Meiorin*, *supra* note 6.

³² *Grismer*, *supra* note 29, at para. 20.

³³ *Ibid.*, at para. 66.

³⁴ *Meiorin*, *supra* note 6, at para. 65.

³⁵ *Quesnel v. London Educational Health Centre*, (1995) 28 C.H.R.R. D/474 at para. 16 (Ont. Bd. of Inquiry) [hereinafter "*Quesnel*"].

³⁶ *Cameron v. Nel-gor Nursing Home* (1984), 5 C.H.R.R. D/2170 at D/2192 (Ont. Bd. of Inquiry) [dictionary citations omitted].

³⁷ *Ibid.* See also *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek))*, [1996] O.H.R.B.I.D. No. 37 (Ont. Bd. of Inquiry), online: QL (HRBD).

³⁸ Robert L. Burgdorf, *Disability Discrimination in Employment Law* (Washington D.C.: Bureau of National Affairs, 1995) at 241.

³⁹ See M. K. Joachim, "The Duty To Accommodate Disabled Workers and the Provision of Alternative Work: An Unexplained Assumption" (2000), 7 *Charter and Human Rights Litigation* 407, for an excellent review of labour and human rights case law. Although Joachim locates the right to alternative employment in section 17(1), it can also be viewed as being located in the section 17(2) and the duty to accommodate. Whichever is the correct reasoning, employees should have some access to alternative employment.

⁴⁰ *Hamilton Civic Hospitals and CUPE, Local 794* (1994), 44 L.A.C. (4th) 31 [Ont. Arb. Award].

⁴¹ In *Chamberlin v. 599273 Ontario Ltd. c.o.b. Stirling Honda* (1989), 11 C.H.R.R. D/110 (Ont. Bd. of Inquiry), the Board of Inquiry found that the employer should have given the complainant the opportunity to prove he could still perform his old job.

⁴² An employer may have to move an employee to a job more consistent with the employee's health status; *Re Calgary District Hospital Group and U.N.A. Loc. 121-R* (1994), 41 L.A.C. (4th) 319 (Alta. Lab. Rel. Bd.). The employer may have to look for work comparable to the original job rather than giving the employee an inferior position; *Re York County Hospital and Ontario Nurses' Association* (1992), 26 L.A.C. (4th) 384 (Ont. Lab. Rel. Bd.). The employer may even need to create a new job by joining together all the light duties and then reassigning the heavy duties to other employees; *Re Greater Niagara Hospital and Ontario Nurses Association* (1995), 50 L.A.C. (4th) 34 (Ont. Lab. Rel. Bd.). In one decision, the employer's duty to accommodate included not only the duties and requirements associated with the current job but also the duties and requirements associated with a bundle of tasks within the ability of an employee with a disability; *Re Mount Sinai Hospital and the O.N.A.* (1996), 54 L.A.C. (4th) 261 (Ont. Lab. Rel. Bd.).

⁴³ *Workplace Safety and Insurance Act*, S.O. 1997 c. 16, Sch. A, ss. 40 and 41 [hereinafter "*WSIA*"].

⁴⁴ There are also rights and obligations pertaining to return to work set out in the *WSIA* that may exist concurrently with human rights protections.

⁴⁵ See Section 17 of the *Code*.

- ⁴⁶ In some cases, accommodation may require the modification of job standards. See the section entitled *Essential Duties and the Current Job*.
- ⁴⁷ *Meiorin*, *supra* note 6, at para. 65-66.
- ⁴⁸ Human Rights Digest, vol. 1, no. 2 (February/March 2000), citing *Conte v. Rogers Cablesystems Ltd.* (1999), C.H.R.R. Doc. 99-227 (Can. Human Rights Tribunal), *Mazuelos v. Clark* (2000) C.H.R.R. Doc. 00-011 (B.C. Human Rights Tribunal) and *Gordy v. Oak Bay Marine Management Ltd.* (2000) C.H.R.R. Doc. 00-040 (B.C. Human Rights Tribunal).
- ⁴⁹ The Supreme Court of Canada's decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [hereinafter "*Renaud*"] sets out the obligations of unions.
- ⁵⁰ *Ibid.* at 988.
- ⁵¹ For further information about drug and alcohol related disabilities, see Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing* (1996, revised September 27, 2000), Online: Ontario Human Rights Commission Web Site <http://www.ohrc.on.ca>.
- ⁵² A. Cantor, "The Costs and Benefits of Accommodating Employees with Disabilities" (Toronto: 1996), online: Cantor + Associates Workplace Accommodation Consultants <http://www.interlog.com/~acantor/>.
- ⁵³ There are a number of cases that confirm this approach to the interpretation of human rights statutes. Most recently, in *Mercier*, *supra* note 10 the Supreme Court summarized these cases and outlined the relevant principles of human rights interpretation.
- ⁵⁴ Section 44 of the *Code*.
- ⁵⁵ *Renaud*, *supra* note 49.
- ⁵⁶ This is not an exclusive list. During the consultations, the issue of whether academic freedom may be a component of undue hardship was raised. Academic freedom is unrelated to the duty to accommodate and should not be a defence to accommodating persons with disabilities. For example, a student may require a more accessible classroom, or need more time in an examination because of a disability-related need. These are legitimate requests that do not diminish academic freedom. If an accommodation need places such a financial burden on the institution that it would amount to undue hardship by reason of cost or because it would substantially change the nature of the enterprise, or its viability, it would then meet the undue hardship standard. This issue will be dealt with at greater length in the Commission's planned guidelines on accommodation in the educational sector.
- ⁵⁷ The issue of customer, third party and employee preference is discussed in J. Keene, *Human Rights in Ontario*, 2nd ed. (Toronto: Carswell, 1992) at 204-205.
- ⁵⁸ *Renaud*, *supra* note 49.
- ⁵⁹ *Meiorin*, *supra* note 6 at para. 68. Those setting standards and rules must be aware of the differences between individuals and groups of individuals. Standards and rules should not just be based on the "mainstream" e.g. employees who do not have disabilities.
- ⁶⁰ *Grismer*, *supra* note 29 at para. 42.
- ⁶¹ *Meiorin*, *supra* note 6, at para. 78-79 and *Grismer*, *supra* note 29 at para. 41. Cases since *Meiorin* and *Grismer* have also applied this stringent requirement for objective evidence; see, for example, *Miele v. Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).
- ⁶² *Grismer*, *supra* note 32, at para. 41.
- ⁶³ Section 25(1) of the *Code*.

⁶⁴ For further discussion on minimizing costs, please refer to section 4.4, "Minimizing Undue Hardship".

⁶⁵ *Second Injury and Enhancement Fund (S.I.E.F), Policy Document (08-01-05) in the Pre-Bill 99 Operational Policy Manual of the Workplace Safety and Insurance Board (W.S.I.B).*

⁶⁶ The Access Fund is an example of an outside source of funding. It helps community organizations develop barrier-free facilities, so persons with disabilities can be active volunteers and participate in potential employment opportunities. The Access Fund is part of Ontario's Equal Opportunity and Disability Partnerships and designed in partnership with the Ontario Trillium Foundation, which delivers the program.

⁶⁷ See *Eldridge*, *supra* note 5.

⁶⁸ R.S.O. 1990 c. 0-1. The OHSA regulations have equivalency clauses that allow for the use of alternative measures to those specified in its regulations, provided the alternative measures afford equal or better protection to workers.

⁶⁹ *Supra*, note 65.

GUIDELINES ON SPECIAL PROGRAMS

Approved by the Commission: November 19, 1997

GUIDELINES ON SPECIAL PROGRAMS

1. Introduction

The Ontario *Human Rights Code* (the “*Code*”) states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Special programs are a way to help people who experience discrimination, economic hardship and disadvantage by putting into place measures that respond to particular needs and that help to reduce discrimination. These special measures or “programs” are protected by section 14 of the *Code*.

To assist employers, landlords and others who adopt such measures, the Commission has developed these Guidelines on Special Programs. The guidelines are intended to encourage the voluntary adoption and use of special programs as well as to clarify how section 14 of the *Code* works. Finally, the Commission’s role in dealing with special programs will be addressed.

2. What Does the *Code* Say?

Section 14 allows special programs to be implemented that might otherwise be considered to be discriminatory under the *Code*. Section 14 of the *Code* defines a special program as a program that is:

- designed to relieve hardship or economic disadvantage; or
- designed to assist disadvantaged persons or groups to achieve equal opportunity; or
- likely to contribute to the elimination of the infringement of rights protected under the *Code*.

A program must satisfy one of the above criteria before it can be a special program as defined by the *Code*. There are many types of programs that might fall within section 14.

Example: A housing co-op reserves a certain number of spaces for women who are leaving a relationship in which they have been battered.

Example: A job program for persons under 25 is put into place to combat youth unemployment.

Example: A community legal clinic provides services only to persons with disabilities to help them fight some of the systemic barriers that have prevented them from fully participating in society.

It is important to make sure that people are aware that a special program exists and that there are restrictions or limits as to who is eligible to apply for a job, or who is entitled under a special program to obtain certain services. For example, a job ad in the context of a job program for youth under 25 should clearly explain to potential applicants or to the public that the employment is part of a special program designed to assist youth under 25 years of age.

3. What is the Relationship between Section 14 and the *Charter*?

The *Charter of Rights and Freedoms* has an equality section that protects Canadians from discrimination by all levels of government. There is a specific section in the *Charter* that protects or “safeguards” special programs from being attacked. In the United States, people were using the Constitution successfully to challenge special programs on the basis that they were “reverse discrimination.” Section 15(2) of the *Charter* was intended to prevent such challenges from successfully eroding or undermining special programs in Canada.

The *Code* applies not only to municipal and provincial governments in Ontario, but it also applies to acts of discrimination between individuals, for example, on the job, or in services or housing. Because of the similarities between the *Charter* and the *Code*, cases decided under the *Charter* can help us understand how section 14 is to be properly interpreted.

4. Why Are Special Programs Protected?

4.1 Substantive Equality

Historically, “equality” has been interpreted to mean that everyone should receive the same or similar treatment. Over time, however, we have come to recognize that providing the same or similar treatment to all persons or groups does not always address their needs or even lead to equal treatment. Similar treatment ignores diversity and special needs. A basic principle of substantive equality is that it allows us to meet the needs of disadvantaged persons or groups using historical, legal and social contexts.¹

4.2 Systemic Discrimination

Direct and constructive² discrimination can create formidable and ongoing barriers to the participation of some people in society. Sometimes, these barriers are “systemic”. Systemic discrimination was defined by the Supreme Court of Canada in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* and *Action travail des femmes* [1987], 8 C.H.R.R. D/4210 at 4227:

... systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of *the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of “natural” forces, for example, that women “just can’t do the job”.

Where systemic discrimination exists, efforts to treat everyone the “same” may not result in equality. In fact, identical treatment may simply perpetuate inequality:

Example: There are few racial minority staff working with company “X”, even though company “X” does not tolerate overt discrimination in its hiring. For years, however, company “X” has hired only by word-of-mouth, which results in most of its applicants coming from family members and friends of the largely white staff. Moreover, some employees display a negative attitude towards the few racial minority colleagues working there. Word has gotten out to potential applicants from other racial groups who see the work environment as hostile to them.

5. How Do You Put a Special Program in Place?

Landlords, service providers and other organizations may initiate their own special programs. No special or advance approval is required by the Commission or provided for by the *Code*. This ensures that special programs can be implemented with a minimum of delay and expense.

If there is doubt as to whether a special program satisfies the requirements of section 14, the Commission may make an order that the special program does not satisfy legal requirements or that modifications are necessary. The procedures to follow in the event that a person wishes to challenge an existing program are set out in the Commission's operational guidelines. Part 7 of this guideline also provides further information.

These Guidelines will help you ensure that the special programs you choose to implement are consistent with the underlying purpose of the *Code*. Here are a few things to keep in mind.

6. What Should Special Programs Look Like?

6.1 Eligibility Criteria

The program should clearly identify who the program is intended to assist. For example:

- through grounds of the *Code*: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age (employment for 18–65), marital status, family status, handicap, record of offenses (in employment), receipt of public assistance (in accommodation).
- disadvantaged persons/groups: persons who are experiencing hardship or economic disadvantage.

Care should be taken to ensure that the program does not unreasonably restrict who will benefit, especially when the restrictions might be considered to be “discriminatory” under the *Code*. There should be a rational connection between any restrictions in eligibility and the purpose of the special program itself.

For example, the Ontario Government offered financial assistance to blind persons who purchased reading devices through its Assistive Devices Programs. This assistance, however, was only available to young individuals. The Court of Appeal said the program discriminated on the basis of age by excluding elderly applicants and stated that there was no rational or logical connection between the age requirements and the purpose of the program. The program was struck down by the Court.

This does not mean, however, that special programs have to include all disadvantaged groups to avoid the risk of being viewed as discriminatory. A special program that is designed to relieve the disadvantage experienced by a particular group, and which, in fact, targets that particular group is not required to expand its eligibility criteria beyond the targeted group.³

6.2 Rationale for Program

The special program should:

- identify the persons or groups;
- state clearly the reasons why the identified persons or groups are considered to be experiencing hardship, disadvantage, or discrimination;
- explain how the proposed measures will relieve this hardship, economic disadvantage or discrimination, or how they will assist in achieving equal opportunity;
- indicate that the special program is for a specific time period and is of a temporary nature.

Evidence of hardship or disadvantage should be objective and where possible, quantifiable. It should not be subjective or based on personal impressions. Always ask, is there a real problem and does this program address it?

As a rule, questions relating to grounds in the *Code* as criteria for offering employment, or promotion or in the context of services, housing, contracts or membership in vocational associations are discriminatory and are prohibited. However, data collection for monitoring and evaluation purposes is permitted by the *Code* in the context of a special program.

Data may also be collected if the information is used to demonstrate under-representation of particular groups or other forms of hardship or disadvantage. Data collection of this type can, for example, determine the racial profile of a workforce in order to put into place a program:

Example: An employer is planning to expand the company and hire new staff. The employer conducts a work survey to see whether the workforce is representative of the community that it serves. Employees are asked to self-identify and to submit the information anonymously to human resources.

Statistics collected on an on-going basis also provide a means of assessing the results of special-program initiatives and can serve as a tool for assessing the need for further measures.

The *Code* does not specify how or even if the collection of data should take place. There are some standard methods to identify groups within, or served by, an organization:

- self-identification surveys;
- use of an employee to conduct a survey;
- use of an external consultant or expert to collect the data.

Each method has its own advantages and disadvantages in terms of associated costs to the organization, rate of return, accuracy of results and protection of the privacy of the individual. As a rule, self-identification surveys are a straightforward way to collect such information, but organizations should select the method that best suits the program goals and organizational culture.

Privacy and dignity should always be a concern in the collection of data. Those organizations which are subject to freedom of information and privacy legislation should ensure that the identification method they choose complies with section 41 of the *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F-31. Further information may be obtained directly from the Information and Privacy Commissioner.

Organizations that are not subject to privacy legislation should nonetheless attempt to collect data in a manner that respects dignity and privacy. For example, organizations can develop internal policies on privacy, or codes of ethics.

Participants must be told how the information will be used. This assurance will help them feel more comfortable when asked to provide the information. Data collected in the context of a special program must be used for special program purposes only. For this reason, storage and access should be carefully controlled.

6.3 Follow a Plan

6.3.1 Consultation

Appropriate steps should be taken to identify and consult with those who may be affected by the proposed special program. Depending on the nature of the program, this could include labour unions or employee associations, tenant associations, service-users or community organizations.

6.3.2 Developing a Plan

The program provider should prepare a plan that includes the following information:

- an outline of how the special program will be implemented, including terms and conditions of the program;
- how long the program will run;
- special measures to be implemented; and
- goals, timetables and anticipated results.

Goals, timetables and anticipated results should be expressed in objective and, where possible, quantifiable terms to show how the program is designed to address existing hardship, economic disadvantage, or discrimination. Special programs are for a specific time period and therefore of a temporary nature.

6.3.3 Monitoring and Evaluation Mechanisms

The program should include a mechanism to monitor and evaluate the progress towards the desired results. It is important to:

- evaluate the effectiveness of the program;
- facilitate accountability within the organization; and
- communicate program results to the organization and/or its client groups.

Example: Tracking target-group members through the system and collecting data to monitor and evaluate the changing composition of client groups is an example of an appropriate monitoring mechanism.

7. What is the Commission's Authority to Inquire into Special Programs?

7.1 Powers of the Commission

The Commission can initiate a complaint against an organization that is infringing the *Code*. In appropriate cases, the Commission can require a remedy in the form of a special program.

Example: In 1991, at the request of employers who were using the services of two Toronto-area employment agencies, the Commission initiated a complaint against the employment agencies that were screening applicants on the basis of race. A settlement was reached which included a requirement that the companies set up an employment equity program.

The *Code* also permits the Commission to investigate complaints against special programs or to initiate its own inquiry into a special program. The Commission may also inquire into that program to determine whether it qualifies as a special program pursuant to section 14(2) of the *Code*.

7.2 Crown Special Programs

Because of section 14(5) of the *Code*, the Commission cannot itself inquire into or make orders against special programs that are implemented by the Crown.

However, once the government provides a benefit, it cannot exclude disadvantaged groups on a discriminatory basis. If a special program is challenged because it denies eligibility to the program in a discriminatory way, the Commission may decide to refer the matter to the Board of Inquiry, which, in turn, would review the special program.

7.3 Specials Programs Cannot Discriminate on Other Grounds

Even where a program appears to qualify as a special program under section 14(1), the program provider cannot arbitrarily discriminate based on other prohibited grounds under the *Code*.

Where special programs must allocate scarce resources (for example, training courses, assistive devices, *etc.*), the resources should be allocated in a manner that reduces or eliminates disadvantage and that is rationally connected to the purpose of the program. (See further, *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)*.⁴

8. Relevant *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 14(1)(2)(3)(4)(5), 23(1) and 41(1).

ENDNOTES

¹ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

² Direct discrimination usually refers to intentional discrimination that results in unequal treatment. Constructive discrimination refers to rules or practices that are neutral on their face but that have an adverse impact resulting in discriminatory treatment or results.

³ See generally *Lovelace v. Ontario* (1997) 33 O.R. (3d) (Ont. C.A). *Lovelace* dealt with a challenge to an affirmative action program under the *Canadian Charter of Rights and Freedoms*. The case was brought by Aboriginal groups who were excluded from a program that was designed for a particular First Nations community and who challenged the program as being under-inclusive. The Court of Appeal disagreed. It held that as long as the program accords with the historical records pertaining to the group's situation and it recognizes the distinct circumstances of the group, and is consistent with the goals of section 15 of the *Charter*, it should be upheld.

⁴ (1994) 21 C.H.R.R. D/259.

DEVELOPING PROCEDURES TO RESOLVE HUMAN RIGHTS COMPLAINTS WITHIN YOUR ORGANIZATION

Approved by the Commission: June 19, 1996

DEVELOPING PROCEDURES TO RESOLVE HUMAN RIGHTS COMPLAINTS WITHIN YOUR ORGANIZATION

1. Introduction

The Ontario *Human Rights Code* (the “*Code*”) states that it is public policy in Ontario to recognize the dignity and worth of every person and to provide equal rights and opportunities without discrimination. The aim is to create a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

The purpose of this booklet is to help organizations develop effective and fair ways to deal with claims of harassment or discrimination that may arise in the workplace. Since most of the questions that the Commission receives deal with human rights issues arising in employment, these guidelines focus on the workplace. However, the principles in these guidelines may also apply in some circumstances to other areas covered by the *Code*, such as a rental accommodation situation.

Ignoring acts of harassment and discrimination has a bad effect on the workplace. Low employee morale, high stress, damaged professional reputations and employee absences are a few of the results of not paying attention to discrimination and harassment.

Dealing promptly with these issues will save you time and money. By letting everyone know what the rules are and what forms of behaviour are not acceptable, you may avoid costly and upsetting procedures in the courts or before special tribunals. In other words, strong policies and programmes prevent human rights complaints and make good business sense.

The Commission suggests that employers develop internal anti-discrimination policies and procedures to solve complaints that may arise as part of a broad program to build an environment that is free from discrimination and harassment. Such a program should be:

- (i) based on a strong message against discrimination and harassment;
- (ii) effective in investigating and settling specific complaints;
- (iii) told clearly to all staff or members of the organization;
- (iv) respectful of the privacy of all the individuals taking part in the process; and
- (v) wherever possible, part of an ongoing educational programme in the workplace.

2. Who Is Responsible?

2.1 Employer Responsibility

Employers have a responsibility to:

- (i) provide a working environment that is free from harassment and discrimination; and
- (ii) deal effectively, quickly and fairly with any situations involving claims of harassment or discrimination that come to their attention.

Employers could be held liable by a court or tribunal if they or their managers do not act to put an end to discrimination or harassment in their workplaces.

2.2 The Role of the Ontario Human Rights Commission

Internal policies and procedures sometimes fail to resolve a problem of harassment and discrimination. If such a problem is brought to the attention of the Commission, it may be necessary for the Commission to intervene to try to settle the complaint.

3. Guidelines for Developing Internal Processes in Your Organization

Several factors, including how complex or how large your organization might be, could determine the kind of procedures you use. These guidelines should provide a useful framework for any organization to use. The following

elements should be part of any complete strategy to resolve human rights issues that may arise in the workplace:

- (i) an anti-harassment or anti-discrimination policy;
- (ii) a complaint-resolution procedure; and
- (iii) on-going education programmes.

These elements should be developed together with the union or other employees' organizations where they may exist in any given workplace.

3.1 Policy

A policy statement should make it clear that discrimination and harassment are violations of the *Code* and will not be tolerated. The policy should describe the types of behaviour that are discriminatory, and should send the message that management takes this issue seriously. The policy should spell out what disciplinary measure would be applied, including the possibility of the loss of employment, if a claim of harassment or discrimination is proven.

It is important to make it clear to employees that having an internal complaint-resolution procedure in place does not in any way stop an individual from going to the Commission, if she or he wants to.¹ Some employees may also have rights under employee collective agreements that will give them other choices for dealing with a problem.

Policies should include:

- (i) a list of the prohibited grounds of discrimination listed in the *Code* (see Appendix "A");
- (ii) a definition of "harassment" as defined by the *Code* (subsection 10(1));
- (iii) an explanation of the notion of a "poisoned environment"² as a violation of the *Code*; and
- (iv) an explanation of the liability of corporations for the behaviour of their officers, managers, employees, *etc.*

All employees should be aware of this internal policy and of any procedures in place for resolving complaints. You can do this by:

- (i) distributing the policy to everyone when it is introduced;
- (ii) sharing it with new employees when they are hired; and
- (iii) training any employee who becomes a member of management, on the contents of the policy.

3.2 Complaint Resolution Procedures

3.2.1 *Appoint an Advisor*

Anyone who feels that she or he has been discriminated against or harassed in the workplace may want to discuss the situation with someone in the company who is familiar with the policy. This person is called an “advisor”, and should be able to provide advice on how to deal with the problem, including information on how to file an internal complaint with management. A person who has been accused of harassment or discrimination should also have the right to meet with an advisor.

The advisor is supposed to be neutral, objective and knowledgeable about human rights issues. The person should be able to provide information and explain choices for dealing with a problem, including the option to approach the Commission for help.

The advisor should also know about grievance procedures under collective agreements or other internal complaint procedures that may apply to the situation.

The advisor should be professional and experienced. He or she also has to make sure that all issues are kept strictly confidential.

3.2.2 *Documentation*

For everyone involved in the process, it is important to make and keep written notes about the events leading to the complaint. These details should include:

- (i) what happened — a description of the events or situation;
- (ii) when it happened — dates and times of the events or incidents;
- (iii) where did it happen; and
- (iv) who saw it happen — the names of any witnesses, if any.

As well, any other documents or materials, such as letters, notes, offensive pictures, *etc.*, that may have something to do with the complaint should be kept.

3.2.3 *Protection from Reprisal*

Persons who make a complaint, as well as anyone else who is involved, should not be penalized for doing so. This is called “reprisal”. Protection from reprisal covers:

- (i) complainants,
- (ii) witnesses,

- (iii) advisors,
- (iv) representatives of complainants and witnesses,
- (v) investigators, and
- (vi) decision makers/management.

3.2.4 Representation

The people involved in an internal complaint resolution process should be allowed to have someone represent them if they wish. Representatives may include union stewards or a colleague.

3.2.5 Investigators

Investigators are responsible for examining the circumstances of a complaint. They should therefore be, and be seen to be as independent and objective as possible. Wherever possible, an investigator should not be in a position of direct authority over any of the people involved in a complaint, but should report to someone with the authority to make decisions and have them enforced. If not, the process will be seen to be weak and without "teeth".

An investigation should not be carried out by anyone who is seen as taking sides with either party. For example, it is not very likely that a lawyer who often represents management in labour disputes will be seen as being objective by non-management employees. Also, the investigator should not be someone in a position to have any power or influence over the career progress of either of the parties.

Investigators must:

- (i) know about human rights in general, and what the *Code* says, in particular; and
- (ii) make sure that the investigation process is confidential.

In most cases, investigations should start immediately after an investigator is chosen, and finish within ninety days.

3.2.6 Resolution

If a complaint cannot be settled through the internal procedure, the employee should be told that a complaint may be filed with the Commission or a grievance filed with the union, if one exists in the particular workplace.

3.3 Education Programmes

Education is an important part of preventing harassment in the workplace. Training programmes for all staff ensure that everyone knows what the rules are and how they will be applied.

Everyone responsible for enforcing the policy or advising on procedures should be thoroughly aware of the policies and procedures that are part of the workplace rules. The organization can:

- (i) provide up-to-date information about human rights issues and important court decisions or board of inquiry decisions in this area of the law;
- (ii) make sure that all staff are trained on how to deal with discrimination and harassment in the workplace;
- (iii) measure the effectiveness of the policies and procedures, and change them if necessary; and
- (iv) respond immediately to any claim of discrimination or harassment.

Both the person making a complaint and the person against whom it is made should know how the internal procedure works. This includes information like:

- (i) who will investigate;
- (ii) how long the process is likely to take;
- (iii) what you will receive at the end of the investigation;
- (iv) who will decide what action the employer will take; and
- (v) what solutions or results are possible.

The person making the complaint should also be told about the time limits that apply with the other choices available for the enforcement of human rights, such as filing a grievance with the union or a complaint with the Commission.

For example, complaints under the *Code* must be filed within six months from the date the last act of alleged discrimination occurred. The Commission has the choice, under section 34(1)(d) of the *Code*, as to whether or not to deal with complaints which are filed past this time limit. For a grievance under a collective agreement, employees should be aware that a much shorter time limit (days or weeks) may apply.

4. The Ontario Human Rights Commission

A person who wishes to complain directly to the Commission may do so, even if she or he has used, or has chosen not to use, the company's internal procedures.

If a person believes that he or she has been harassed or discriminated against, the Commission will try to settle the dispute, if possible. If that fails, the complaint will then be investigated by the Commission.

4.1 Will the Commission Deal with All Complaints?

According to the *Code*, the Commission does not have to deal with all complaints. The *Code* allows the Commission to decide not to deal with a complaint in certain situations:

- (i) if another provincial law, such as the *Employment Standards Act* or the grievance procedure under the *Labour Relations Act*, would be a better law for dealing with the complaint;
- (ii) if the complaint is trivial, petty, bothersome or made in bad faith;
- (iii) if the employer is outside provincial law and therefore the *Code* does not apply (for example, if someone has a complaint against a bank or an airline, that complaint would be dealt with under federal jurisdiction); or
- (iv) if an individual files a complaint more than six months after the events upon which the complaint is based. The Commission will decide not to deal with complaints of this kind if the complainant's delay was in bad faith (for example, if a person delays the filing of a complaint on purpose), or if the delay causes significant prejudice to the employer (for example, if after six months, important documents are destroyed or witnesses are no longer available).

Only the Commissioners have the right to make a decision not to deal with a complaint. In such situations, the Commission will decide each case on its own merit or value. The Commission by law has to provide reasons to the parties when a decision is made not to deal with a case under section 34. If a decision is made not to deal with a complaint, this does not mean the complaint has been dismissed or evaluated on its merits. It simply means that the complaint is outside of the Commission's control, or that it would be unfair to the parties to go ahead with the complaint for the reasons outlined above.

4.2 The Commission and the Board of Inquiry

The Commission is required by the *Code* to try to settle complaints and to conduct investigations. If the Commission cannot settle a complaint and if there is enough evidence, the Commission may refer the complaint to a board of inquiry.

Boards of inquiry are separate decision-making bodies or tribunals that are completely independent from the Commission. The board of inquiry has a wide range of powers to make orders against the employer, organization or individual who is named as a respondent to the complaint. Orders may include offers of employment or job reinstatement, financial compensation for lost wages, mental anguish, etc. A board of inquiry can also order an employer to adapt the workplace to accommodate the needs of a person with a disability.

5. Relevant *Human Rights Code* Provisions

The Ontario *Human Rights Code* (page 264) includes provisions relevant to this policy in the following sections: 10(1), 34(1) and 45(1).

6. Appendix

Under Ontario's *Human Rights Code*, a person has the right to equal treatment in a number of social areas:

- (i) services;
- (ii) accommodation (where you live);
- (iii) employment;
- (iv) contracts;
- (v) membership in trade unions and vocational associations;

based on the following grounds:

- (i) race;
- (ii) ancestry;
- (iii) place of origin;
- (iv) colour;
- (v) ethnic origin;
- (vi) citizenship;
- (vii) creed (religion);
- (viii) sex;
- (ix) sexual orientation;

- (x) age;
- (xi) record of offenses (in employment);
- (xii) marital status;
- (xiii) same-sex partnership status
- (xiv) family status (being in a parent-child relationship);
- (xv) receipt of public assistance (in housing);
- (xvi) mental or physical handicap.

ENDNOTES

¹ *Ontario Human Rights Commission v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202. this case states that one cannot contract out of the rights under the *Code*.

² A "poisoned environment" is a form of discrimination. It may be created by comments or actions of any person regardless of her/his position or status. These offensive comments or actions spoil the work, housing or other environment. The poisoned environment forms an unequal term or condition of employment, accommodation, etc. and is therefore a violation of the right to be free from discrimination. See further *Wei Fu v. Ontario Government Protective Services* (1985), 6 C.H.R.R. D/2797 (Ont. Bd. of Inquiry); *Dhillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 (Ont. Bd. of Inquiry); *Lee v. T.J. Applebee's Food Conglomeration* (1987), 9 C.H.R.R. D/4781 (Ont. Bd. of Inquiry).

PART II — ONTARIO HUMAN RIGHTS CODE & REGULATIONS

ONTARIO HUMAN RIGHTS CODE

Amended by: 1993, c. 27, Sched.; 1993, c. 35, s. 56; 1994, c. 10, s. 22; 1994, c. 27, s. 65; 1995, c. 4, s. 3; 1997, c. 16, s. 8; 1997, c. 24, s. 212; 1999, c. 6, s. 28.

As of March 21, 2000.

Preamble

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the *Universal Declaration of Human Rights* as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Part I Freedom from Discrimination

Services

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of

origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28(1).

Accommodation

2. (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2(1); 1999, c. 6, s. 28(2).

Harassment in accommodation

(2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2(2); 1999, c. 6, s. 28(3).

Contracts

3. Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 3; 1999, c. 6, s. 28(4).

Accommodation of person under eighteen

4. (1) Every sixteen or seventeen year old person who has withdrawn from parental control has a right to equal treatment with respect to occupancy of and contracting for accommodation without discrimination because the person is less than eighteen years old.

Idem

(2) A contract for accommodation entered into by a sixteen or seventeen year old person who has withdrawn from parental control is enforceable against that person as if the person were eighteen years old. R.S.O. 1990, c. H.19, s. 4.

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 5(1); 1999, c. 6, s. 28(5).

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 5(2); 1999, c. 6, s. 28(6).

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28(7).

Harassment because of sex in accommodation

7. (1) Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building.

Harassment because of sex in workplaces

(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

Sexual solicitation by a person in position to confer benefit, etc.

- (3) Every person has a right to be free from,
- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 - (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. R.S.O. 1990, c. H.19, s. 7.

Reprisals

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. R.S.O. 1990, c. H.19, s. 8.

Infringement prohibited

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. R.S.O. 1990, c. H.19, s. 9.

Part II
Interpretation and Application***Definitions***

10. (1) In Part I and in this Part,

“age” means an age that is eighteen years or more, except in subsection 5(1) where “age” means an age that is eighteen years or more and less than sixty-five years; (“âge”)

"because of handicap" means for the reason that the person has or has had, or is believed to have or have had,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental retardation or impairment,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; ("à cause d'un handicap")

"equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination; ("égal")

"family status" means the status of being in a parent and child relationship; ("état familial")

"group insurance" means insurance whereby the lives or well-being or the lives and well-being of a number of persons are insured severally under a single contract between an insurer and an association or an employer or other person; ("assurance-groupe")

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome; ("harcèlement")

"marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage; ("état matrimonial")

"record of offences" means a conviction for,

- (a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
- (b) an offence in respect of any provincial enactment; (“casier judiciaire”)

“same-sex partner” means the person with whom a person of the same sex is living in a conjugal relationship outside marriage; (“partenaire de même sexe”)

“same-sex partnership status” means the status of living with a person of the same sex in a conjugal relationship outside marriage; (“partenariat avec une personne de même sexe”)

“services” does not include a levy, fee, tax or periodic payment imposed by law; (“services”)

“spouse” means the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage. (“conjoint”) R.S.O. 1990, c. H.19, s. 10(1); 1993, c. 27, Sched.; 1997, c. 16, s. 8; 1999, c. 6, s. 28(8).

Pregnancy

(2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant. R.S.O. 1990, c. H.19, s. 10(2).

Constructive discrimination

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11(1).

Idem

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 11(2); 1994, c. 27, s. 65(1).

Idem

(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 11(3); 1994, c. 27, s. 65(2).

Discrimination because of association

12. A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 12.

Announced intention to discriminate

13. (1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

Opinion

(2) Subsection (1) shall not interfere with freedom of expression of opinion. R.S.O. 1990, c. H.19, s. 13.

Special programs

14. (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve

equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

Review by Commission

(2) The Commission may,

- (a) upon its own initiative;
- (b) upon application by a person seeking to implement a special program under the protection of subsection (1); or
- (c) upon a complaint in respect of which the protection of subsection (1) is claimed,

inquire into the special program and, in the discretion of the Commission, may by order declare,

- (d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or
- (e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

Reconsideration

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies.

Effect of order

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(d) or where an order is made under clause (2)(e) with modifications of the special program that are not implemented.

Subs. (2) does not apply to Crown

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown. R.S.O. 1990, c. H.19, s. 14.

14.1. REPEALED: 1995, c. 4, s. 3(1).

Age sixty-five or over

15. A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment. R.S.O. 1990, c. H.19, s. 15.

Canadian Citizenship

16. (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.

Idem

(2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.

Idem

(3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions. R.S.O. 1990, c. H.19, s. 16.

Handicap

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap. R.S.O. 1990, c. H.19, s. 17(1).

Accommodation

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for

accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 17(2); 1994, c. 27, s. 65(2).

Idem

(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 17(3); 1994, c. 27, s. 65(2).

Powers of Commission

(4) Where, after the investigation of a complaint, the Commission determines that the evidence does not warrant the subject-matter of the complaint being referred to the board of inquiry because of the application of subsection (1), the Commission may nevertheless use its best endeavours to effect a settlement as to the duties or requirements. R.S.O. 1990, c. H.19, s. 17(4); 1994, c. 27, s. 65(3).

Special interest organizations

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified. R.S.O. 1990, c. H.19, s. 18.

Separate school rights preserved

19.(1) This Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*.

Duties of teachers

(2) This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers. R.S.O. 1990, c. H.19, s. 19.

Restriction of facilities by sex

20. (1) The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency.

Minimum drinking age

(2) The right under section 1 to equal treatment with respect to services, goods and facilities without discrimination because of age is not infringed by the provisions of the *Liquor Licence Act* and the regulations under it relating to providing for and enforcing a minimum drinking age of nineteen years. R.S.O. 1990, c. H.19, s. 20(1, 2).

Recreational clubs

(3) The right under section 1 to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or facilities or gives preferences with respect to membership dues and other fees because of age, sex, marital status, same-sex partnership status or family status. R.S.O. 1990, c. H.19, s. 20(3); 1999, c. 6, s. 28(9).

Tobacco and young persons

(4) The right under section 1 to equal treatment with respect to goods without discrimination because of age is not infringed by the provisions of the *Tobacco Control Act, 1994* and the regulations under it relating to selling or supplying tobacco to persons who are, or who appear to be, under the age of 19 years. R.S.O. 1994, c. 10, s. 22.

Shared accommodation

21. (1) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed by discrimination where the residential accommodation is in a dwelling in which the owner or his or her family reside if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner.

Restrictions on accommodation, sex

(2) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of sex is not infringed by discrimination on that ground where the occupancy of all the residential accommodation in the building, other than the accommodation, if any, of the owner or family of the owner, is restricted to persons who are of the same sex. R.S.O. 1990, c. H.19, s. 21.

Prescribing business practices

(3) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed if a landlord uses in the manner prescribed under this Act income information, credit checks, credit references, rental history, guarantees or other similar business practices which are prescribed in the regulations made under this Act in selecting prospective tenants. R.S.O. 1997, c. 24, s. 212(1).

Restrictions for insurance contracts, etc.

22. The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, same-sex partnership status, family status or handicap, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 22; 1999, c. 6, s. 28(10).

Discriminatory employment advertising

23.(1) The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

Application for employment

(2) The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

Questions at interview

(3) Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act.

Employment agencies

(4) The right under section 5 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer. R.S.O. 1990, c. H.19, s. 23.

Special employment

24.(1) The right under section 5 to equal treatment with respect to employment is not infringed where,

- (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or handicap employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;
- (b) the discrimination in employment is for reasons of age, sex, record of offences, marital status or same-sex partnership status if the age, sex, record of offences, marital status or same-sex partnerships status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

- (c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse, same-sex partner or relative of the person; or
- (d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, same-sex partner, child or parent of the employer or an employee. R.S.O. 1990, c. H.19, s. 24(1); 1999, c. 6, s. 28(11).

Reasonable accommodation

(2) The Commission, the board of inquiry or a court shall not find that a qualification under clause (1)(b) is reasonable and *bona fide* unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 24(2); 1994, c. 27, s. 65(4).

Idem

(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 24(3); 1994, c. 27, s. 65(4).

24.1. REPEALED: 1995, c. 4, s. 3(2).

Employment conditional on membership in pension plan

25. (1) The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 25(1).

Pension or disability plan

(2) The right under section 5 to equal treatment with respect to employment without discrimination because of age, sex, marital status, same-sex partnership status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act* and the regulations thereunder. R.S.O. 1990, c. H.19, s. 25(2); 1999, c. 6, s. 28(12).

Employee disability and pension plans: handicap

(3) The right under section 5 to equal treatment with respect to employment without discrimination because of handicap is not infringed,

- (a) where a reasonable and *bona fide* distinction, exclusion or preference is made in an employee disability or life insurance plan or benefit because of a pre-existing handicap that substantially increases the risk;
- (b) where a reasonable and *bona fide* distinction, exclusion or preference is made on the ground of a pre-existing handicap in respect of an employee-pay-all or participant-pay-all benefit in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer or in respect of a plan, fund or policy that is offered by an employer to employees if they are fewer than twenty-five in number.

Compensation

(4) An employer shall pay to an employee who is excluded because of a handicap from an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and the employer compensation equivalent to the contribution that the employer would make thereto on behalf of an employee who does not have a handicap. R.S.O. 1990, c. H.19, s. 25(3, 4).

Discrimination in employment under government contracts

26. (1) It shall be deemed to be a condition of every contract entered into by or on behalf of the Crown or any agency thereof and of every subcontract

entered into in the performance thereof that no right under section 5 will be infringed in the course of performing the contract.

Idem: government grants and loans

(2) It shall be deemed to be a condition of every grant, contribution, loan or guarantee made by or on behalf of the Crown or any agency thereof that no right under section 5 will be infringed in the course of carrying out the purposes for which the grant, contribution, loan or guarantee was made.

Sanction

(3) Where an infringement of a right under section 5 is found by a board of inquiry upon a complaint and constitutes a breach of a condition under this section, the breach of condition is sufficient grounds for cancellation of the contract, grant, contribution, loan or guarantee and refusal to enter into any further contract with or make any further grant, contribution, loan or guarantee to the same person. R.S.O. 1990, c. H.19, s. 26.

Part III The Ontario Human Rights Commission

Commission continued

27. (1) The Ontario Human Rights Commission is continued under the name Ontario Human Rights Commission in English and Commission ontarienne des droits de la personne in French and shall be composed of such persons, being not fewer than seven, as are appointed by the Lieutenant Governor in Council.

Responsible to Minister

(2) The Commission is responsible to the Minister for the administration of this Act.

Chair

(3) The Lieutenant Governor in Council shall designate a member of the Commission as chair, and a member as vice-chair.

Remuneration

(4) The Lieutenant Governor in Council may fix the remuneration and allowance for expenses of the chair, vice-chair and members of the Commission.

Employees

(5) The employees of the Commission shall be appointed under the *Public Service Act*.

Divisions

(6) The Commission may authorize any function of the Commission to be performed by a division of the Commission composed of at least three members of the Commission. R.S.O. 1990, c. H.19, s. 27.

Race relations division

28. (1) The Lieutenant Governor in Council shall designate at least three members of the Commission to constitute a race relations division of the Commission and shall designate one member of the race relations division as Commissioner for Race Relations.

Functions

(2) It is the function of the race relations division of the Commission to perform any of the functions of the Commission under clause 29(f), (g) or (h) relating to race, ancestry, place of origin, colour, ethnic origin or creed that are referred to it by the Commission and any other function referred to it by the Commission. R.S.O. 1990, c. H.19, s. 28.

Function of Commission

29. It is the function of the Commission,

- (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
- (b) to promote an understanding and acceptance of and compliance with this Act;

- (c) to recommend for consideration a special plan or program designed to meet the requirements of subsection 14(1), subject to the right of a person aggrieved by the implementation of the plan or program to request the Commission to reconsider its recommendation and section 37 applies with necessary modifications;
- (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act;
- (e) to examine and review any statute or regulation, and any program or policy made by or under a statute and make recommendations on any provision, program or policy, that in its opinion is inconsistent with the intent of this Act;
- (f) to inquire into incidents of and conditions leading or tending to lead to tension or conflict based upon identification by a prohibited ground of discrimination and take appropriate action to eliminate the source of tension or conflict;
- (g) to initiate investigations into problems based upon identification by a prohibited ground of discrimination that may arise in a community, and encourage and co-ordinate plans, programs and activities to reduce or prevent such problems;
- (h) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;
- (i) to enforce this Act and orders of the board of inquiry;
- (j) to perform the functions assigned to it by this or any other Act. R.S.O. 1990, c. H.19, s. 29; 1994, c. 27, s. 65(6).

Evidence obtained in course of investigation

30. (1) No person who is a member of the Commission shall be required to give testimony in a civil suit or any proceeding as to information obtained in the course of an investigation under this Act.

Idem

(2) No person who is employed in the administration of this Act shall be required to give testimony in a civil suit or any proceeding other than a proceeding under this Act as to information obtained in the course of an investigation under this Act. R.S.O. 1990, c. H.19, s. 30.

Annual report

31. (1) The Commission shall make a report to the Minister not later than the 30th day of June in each year upon the affairs of the Commission during the year ending on the 31st day of March of that year.

Idem

(2) The Minister shall submit the report to the Lieutenant Governor in Council who shall cause the report to be laid before the Assembly if it is in session, or, if not, at the next session. R.S.O. 1990, c. H.19, s. 31.

**Part IV
Enforcement*****Complaints***

32. (1) Where a person believes that a right of the person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission.

Idem

(2) The Commission may initiate a complaint by itself or at the request of any person.

Combining of complaints

(3) Where two or more complaints,

- (a) bring into question a practice of infringement engaged in by the same person;

or

- (b) have questions of law or fact in common,

the Commission may combine the complaints and deal with them in the same proceeding. R.S.O. 1990, c. H.19, s. 32.

Investigation of complaints

33.(1) Subject to section 34, the Commission shall investigate a complaint and endeavour to effect a settlement.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 33(1) is repealed by the Statutes of Ontario, 1994, chapter 27, subsection 65(7) and the following substituted:

Investigation of complaints

(1) Subject to section 34, the Commission shall investigate a complaint and may endeavour to effect a settlement.

See: 1994, c. 27, ss. 65(7), 66(1).

Investigation

(2) An investigation by the Commission may be made by a member or employee of the Commission who is authorized by the Commission for the purpose.

Powers on investigation

- (3) A person authorized to investigate a complaint may,
 - (a) enter any place, other than a place that is being used as a dwelling, at any reasonable time, for the purpose of investigating the complaint;
 - (b) request the production for inspection and examination of documents or things that are or may be relevant to the investigation;
 - (c) upon giving a receipt therefor, remove from a place documents produced in response to a request under clause (b) for the purpose of making copies thereof or extracts therefrom and shall promptly return them to the person who produced or furnished them; and

- (d) question a person on matters that are or may be relevant to the complaint subject to the person's right to have counsel or a personal representative present during such questioning, and may exclude from the questioning any person who may be adverse in interest to the complainant.

Entry into dwellings

(4) A person investigating a complaint shall not enter a place that is being used as a dwelling without the consent of the occupier except under the authority of a warrant issued under subsection (8). R.S.O. 1990, c. H.19, s. 33(1-4).

Denial of entry

(5) Subject to subsection (4), if a person who is or may be a party to a complaint denies entry to any place, or instructs the person investigating to leave the place, or impedes or prevents an investigation therein, the Commission may refer the matter to the board of inquiry or may authorize an employee or member to apply to a justice of the peace for a warrant to enter under subsection (8). R.S.O. 1990, c. H.19, s. 33(5); 1994, c. 27, s. 65(8).

Refusal to produce

(6) If a person refuses to comply with a request for production of documents or things, the Commission may refer the matter to the board of inquiry, or may authorize an employee or member to apply to a justice of the peace for a search warrant under subsection (7). R.S.O. 1990, c. H.19, s. 33(6); 1994, c. 27, s. 65(9).

Warrant for search

(7) Where a justice of the peace is satisfied on evidence upon oath or affirmation that there are in a place documents that there is reasonable ground to believe will afford evidence relevant to the complaint, he or she may issue a warrant in the prescribed form authorizing a person named in the warrant to search a place for any such documents, and to remove them for the purposes of making copies thereof or extracts therefrom, and the documents shall be returned promptly to the place from which they were removed.

Warrant for entry

(8) Where a justice of the peace is satisfied by evidence upon oath or affirmation that there is reasonable ground to believe it is necessary that a place being used as a dwelling or to which entry has been denied be entered to investigate a complaint, he or she may issue a warrant in the prescribed form authorizing such entry by a person named in the warrant.

Execution of warrant

(9) A warrant issued under subsection (7) or (8) shall be executed at reasonable times as specified in the warrant.

Expiration of warrant

(10) Every warrant shall name a date on which it expires, which shall be a date not later than fifteen days after it is issued.

Obstruction

(11) No person shall hinder, obstruct or interfere with a person in the execution of a warrant or otherwise impede an investigation under this Act.

Idem

(12) Subsection (11) is not contravened by a refusal to comply with a request for the production of documents or things made under clause (3)(b).

Admissibility of copies

(13) Copies of, or extracts from, documents removed from premises under clause (3)(c) or subsection (7) certified as being true copies of the originals by the person who made them, are admissible in evidence to the same extent as, and have the same evidentiary value as, the documents of which they are copies or extracts. R.S.O. 1990, c. H.19, s. 33(7-13).

Decision to not deal with complaint

34. (1) Where it appears to the Commission that,

- (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
- (b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
- (c) the complaint is not within the jurisdiction of the Commission; or
- (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,

the Commission may, in its discretion, decide to not deal with the complaint.

Notice of decision and reasons

(2) Where the Commission decides to not deal with a complaint, it shall advise the complainant in writing of the decision and the reasons therefor and of the procedure under section 37 for having the decision reconsidered. R.S.O. 1990, c. H.19, s. 34.

Board of inquiry

35. (1) There shall be a board of inquiry for the purposes of this Act composed of such members as are appointed by the Lieutenant Governor in Council.

Remuneration

(2) The members of the board of inquiry shall be paid such allowances and expenses as are fixed by the Lieutenant Governor in Council.

Chair, vice-chair

(3) The Lieutenant Governor in Council shall appoint a chair and may appoint one or more vice-chairs of the board of inquiry from among the members of the board of inquiry.

Employees

(4) Such employees as are considered necessary for the proper conduct of the board of inquiry may be appointed under the *Public Service Act*.

Rules

(5) The board of inquiry may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the *Regulations Act*.

Panels

(6) The chair of the board of inquiry may appoint panels composed of one or more members of the board to hold hearings in the place of the full board wherever the board of inquiry is required to hold a hearing under this Act and, where a panel holds a hearing, the panel has all the powers and duties, except the power in subsection (5), given to the board of inquiry under this Act.

Person designated to preside over panel

(7) The chair of the board shall designate one member of each panel to preside over the panel's hearings.

Reassignment of panel

(8) Where a panel of the board is unable for any reason to exercise the powers under section 39 or 41, the chair of the board of inquiry may assign another panel in its place. R.S.O. 1994, c. 27, s. 65(10).

Note: Any hearing commenced by a board of inquiry appointed under this Code, as it read immediately before April 17, 1995, may be continued to its conclusion as if section 35 had not been re-enacted by the Statutes of Ontario, 1994, chapter 27, subsection 65(10). See: R.S.O. 1994, c. 27, s. 65(10, 11).

Referred to board of inquiry

36. (1) Where the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate

and the evidence warrants an inquiry, the Commission may refer the subject-matter of the complaint to the board of inquiry. R.S.O. 1994, c. 27, s. 65(12).

Notice of decision not to refer to board

(2) Where the Commission decides to not refer the subject-matter of a complaint to the board of inquiry, it shall advise the complainant and the person complained against in writing of the decision and the reasons therefor and inform the complainant of the procedure under section 37 for having the decision reconsidered. R.S.O. 1990, c. H.19, s. 36(2); 1994, c. 27, s. 65(13).

Reconsideration

37. (1) Within a period of fifteen days of the date of mailing the decision and reasons therefor mentioned in subsection 34(2) or subsection 36(2), or such longer period as the Commission may for special reasons allow, a complainant may request the Commission to reconsider its decision by filing an application for reconsideration containing a concise statement of the material facts upon which the application is based.

Notice of application

(2) Upon receipt of an application for reconsideration the Commission shall as soon as is practicable notify the person complained against of the application and afford the person an opportunity to make written submissions with respect thereto within such time as the Commission specifies.

Decision

(3) Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final. R.S.O. 1990, c. H.19, s. 37.

38. REPEALED: 1994, c. 27, s. 65(14).

Hearing

39. (1) The board of inquiry shall hold a hearing,

- (a) to determine whether a right of the complainant under this Act has been infringed;
- (b) to determine who infringed the right; and
- (c) to decide upon an appropriate order under section 41,

and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the board. R.S.O. 1990, c. H.19, s. 39(1); 1994, c. 27, s. 65(15).

Parties

- (2) The parties to a proceeding before the board of inquiry are,
 - (a) the Commission, which shall have the carriage of the complaint;
 - (b) the complainant;
 - (c) any person who the Commission alleges has infringed the right;
 - (d) any person appearing to the board of inquiry to have infringed the right;
 - (e) where the complaint is of alleged conduct constituting harassment under subsection 2(2) or subsection 5(2) or of alleged conduct under section 7, any person who, in the opinion of the board, knew or was in possession of facts from which the person ought reasonably to have known of the conduct and who had authority to penalize or prevent the conduct. R.S.O. 1990, c. H.19, s. 39(2); 1994, c. 27, s. 65(16).

Adding parties

(3) A party may be added by the board of inquiry under clause (2)(d) or clause (2)(e) at any stage of the proceeding upon such terms as the board considers proper. R.S.O. 1990, c. H.19, s. 39(3).

Adjournment on production

(4) Where the board exercises its power under clause 12(1)(b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production in evidence of documents or things, it may, upon the production of the

documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things. R.S.O. 1990, c. H.19, s. 39(4); 1994, c. 27, s. 65(17).

Adjournment for view

(5) The board may, where it appears to be in the interests of justice, direct that the board and the parties and their counsel or representatives shall have a view of any place or thing, and may adjourn the proceedings for that purpose. R.S.O. 1990, c. H.19, s. 39(5).

Members at hearing not to have taken part in investigation, etc.

(6) A member of the board of inquiry hearing a complaint must not have taken part in any investigation or consideration of the subject-matter of the inquiry before the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the inquiry with any person or with any party or any party's representative except upon notice to and opportunity for all parties to participate, but the board may seek legal advice from an adviser independent of the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law. R.S.O. 1994, c. 27, s. 65(18).

40. REPEALED: 1994, c. 27, s. 65(19).

Orders of boards of inquiry

41. (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

- (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish. R.S.O. 1990, c. H.19, s. 41(1).

Order to prevent harassment

(2) Where the board of inquiry makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2(2) or subsection 5(2) or conduct under section 7, and the board finds that a person who is a party to the proceeding,

- (a) knew or was in possession of knowledge from which the person ought to have known of the infringement; and
- (b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,

the board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 36(2), request the board to re-convene and if the board finds that a person who is a party to the proceeding,

- (c) knew or was in possession of knowledge from which the person ought to have known of the repetition of infringement; and
- (d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,

the board may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right. R.S.O. 1990, c. H.19, s. 41(2); 1994, c. 27, s. 65(20).

(3) REPEALED: 1994, c. 27, s. 65(21).

Costs

- (4) Where, upon dismissing a complaint, the board of inquiry finds that,
- (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
 - (b) in the particular circumstances undue hardship was caused to the person complained against,

the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

Decision within 30 days

(5) The board of inquiry shall make its finding and decision within thirty days after the conclusion of its hearing. R.S.O. 1990, c. H.19, s. 41(4, 5).

41.1. REPEALED: 1995, c. 4, s. 3(3).

Appeal from decision of board of inquiry

42. (1) Any party to a proceeding before the board of inquiry may appeal from a decision or order of the board to the Divisional Court in accordance with the rules of court. R.S.O. 1990, c. H.19, s. 42(1); 1994, c. 27, s. 65(23).

Record to be filed in court

(2) Where notice of an appeal is served under this section, the board of inquiry shall forthwith file in the Divisional Court the record of the proceedings before it in which the decision or order appealed from was made and the record, together with a transcript of the oral evidence taken before the board if it is not part of the record of the board, shall constitute the record in the appeal.

Powers of court

(3) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board of inquiry or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board. R.S.O. 1990, c. H.19, s. 42(2, 3).

Settlements

43. Where a settlement of a complaint is agreed to in writing, signed by the parties and approved by the Commission, the settlement is binding upon the parties, and a breach of the settlement is grounds for a complaint under section 32, and this Part applies to the complaint in the same manner as if the breach of the settlement were an infringement of a right under this Act. R.S.O. 1990, c. H.19, s. 43.

Penalty

44. (1) Every person who contravenes section 9, subsection 33(11), or an order of the board of inquiry, is guilty of an offence and on conviction is liable to a fine of not more than \$25,000. R.S.O. 1990, c. H.19, s. 44(1); 1994, c. 27, s. 65(23).

Consent to prosecution

(2) No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Attorney General. R.S.O. 1990, c. H.19, s. 44(2).

Acts of officers, etc.

45. (1) For the purposes of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 44(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. R.S.O. 1990, c. H.19, s. 45(1).

Opinion re authority or acquiescence

(2) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, the board of inquiry in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1). R.S.O. 1990, c. H.19, s. 45(2); 1994, c. 27, s. 65(23).

Part V General

Definitions

46. In this Act,

“board of inquiry” means the board of inquiry established under section 35; (“commission d’enquête”)

“Commission” means the Ontario Human Rights Commission; (“Commission”)

“Minister” means the member of the Executive Council to whom the powers and duties of the Minister under this Act are assigned by the Lieutenant Governor in Council; (“ministre”)

“person” in addition to the extended meaning given it by the *Interpretation Act*, includes an employment agency, an employers’ organization, an unincorporated association, a trade or occupational association, a trade union, a partnership, a municipality, a board of police commissioners established under the *Police Act*, being chapter 381 of the Revised Statutes of Ontario, 1980, and a police services board established under the *Police Services Act*. (“personne”) R.S.O. 1990, c. H.19, s. 46; 1994, c. 27, s. 65(24).

Act binds Crown

47. (1) This Act binds the Crown and every agency of the Crown.

Act has primacy over other Acts

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47.

Regulations

48. The Lieutenant Governor in Council may make regulations,

- (a) prescribing standards for assessing what is undue hardship for the purposes of section 11, 17 or 24;

- (a.1) prescribing the manner in which income information, credit checks, credit references, rental history, guarantees or other similar business practices may be used by a landlord in selecting prospective tenants without infringing section 2, and prescribing other similar business practices and the manner of their use, for the purposes of subsection 21(3);
- (b) prescribing forms and notices and providing for their use;
- (c) prescribing time limits for the production of documents and things requested in an investigation under clause 33(3)(b);
- (d) prescribing procedures for carrying out an investigation under section 33;
- (e) prescribing matters that the Commission shall consider in deciding whether or not to endeavour to effect a settlement under subsection 33(1). R.S.O. 1990, c. H.19, s. 48; 1994, c. 27, s. 65(25); 1997, c. 24, s. 212(2).

REGULATION 642

Amended to O. Reg. 22/92

Search and Entry Warrants

This is the English version of a bilingual regulation.

1. A search warrant under subsection 33(7) of the Act shall be in Form 1.
R.R.O. 1990, Reg. 642, s. 1.

2. A warrant to enter under subsection 33(8) of the Act shall be in Form 2.
R.R.O. 1990, Reg. 642, s. 2.

Form 1

Human Rights Code

WARRANT TO SEARCH UNDER SUBSECTION 33(7)
OF THE HUMAN RIGHTS CODE



Form 1
Warrant to Search
under Subsection 33(7) of the Human Rights Code

Formule 1
Mandat de perquisition
aux termes du paragraphe 33(7) du Code des droits de la personne

To _____
A _____

WHEREAS, on the evidence upon oath or affirmation of _____
ATTENDU QUE, suivant le témoignage sous serment ou affirmation solennelle de _____

I am satisfied that there are in _____
Je suis convaincu(e) qu'il y a à/au _____
(name and address of place)
(nom et adresse de l'endroit)

documents, namely _____
des documents, précisément _____
(describe documents to be searched for)
(décrire les documents à perquisitionner)

and that there is reasonable ground to believe the documents will afford evidence relevant to a complaint by _____
et qu'il y a des motifs raisonnables de croire que ces documents constitueront une preuve pertinente à la plainte déposée par _____

_____ (name(s) of complainant(s))
(nom du ou des plaignants)

against _____
contre _____
(party against whom complaint is made)
(partie faisant l'objet de la plainte)

dated _____
le _____

that _____
selon laquelle _____
(describe nature of complaint)
(décrire la nature de la plainte)

This is therefore to authorize you to enter the place described above between the hours of _____ and _____
Pour ces raisons, la présente vous autorise à pénétrer dans l'endroit décrit ci-dessus entre _____ heures et _____ heures

and to search there for the documents described above and to remove them for the purpose of making copies of them or extracts from them.
et à perquisitionner les documents décrits ci-dessus et à les enlever pour en tirer des copies ou des extraits.

This warrant expires on _____, 19 ____
Le présent mandat expire le _____, 19 ____

Issued at _____ on _____, 19 ____
Décerné à _____ le _____, 19 ____

Form 2

Human Rights Code

WARRANT TO ENTER UNDER SUBSECTION 33(8)
OF THE HUMAN RIGHTS CODE



Ontario
Human Rights
Commission

Commission
ontarienne des droits
de la personne

Form 2
Warrant to Enter
under Subsection 33(8) of the Human Rights Code

Formule 2
Mandat d'entrée
aux termes du paragraphe 33(8) du Code des droits de la personne

To _____
A _____

WHEREAS, on the evidence upon oath or affirmation of _____
ATTENDU QUE, suivant le témoignage sous serment ou affirmation solennelle de _____

I am satisfied that there is reasonable ground to believe it is necessary that
je suis convaincu(e) qu'il y a des motifs raisonnables de croire qu'il est nécessaire de pénétrer dans _____

(name and address of place)
(nom et adresse de l'endroit)

(check appropriate box) ☐ which is being used as a dwelling, or ☐ to which entry has been denied,
(Cocher la case appropriée) qui sert de logement, ou duquel l'accès a été refusé

be entered to investigate a complaint dated _____
pour faire enquête sur la plainte du _____

by _____
déposée par _____
(name(s) of complainant(s))
(nom du ou des plaignant(s))

against _____
contre _____
(party against whom complaint is made)
(partie faisant l'objet de la plainte)

that _____
selon laquelle _____
(describe nature of complaint)
(décrire la nature de la plainte)

This is therefore to authorize you to enter the place described above between the hours of _____ and _____
Pour ces raisons, la présente vous autorise à pénétrer dans l'endroit décrit ci-dessus entre _____ heures et _____ heures

and to investigate the complaint.
et à faire enquête sur la plainte.

This warrant expires on _____, 19 _____.
Le présent mandat expire le _____, 19 _____.

Issued at _____ on _____, 19 _____.
Décerné à _____ le _____, 19 _____.

ONTARIO REGULATION 290/98

Amended to O. Reg. 31/00

Business Practices Permissible to Landlords in Selecting Prospective Tenants for Residential Accommodation

This is the English version of a bilingual regulation.

1.(1) A landlord may request credit references and rental history information, or either of them, from a prospective tenant and may request from a prospective tenant authorization to conduct credit checks on the prospective tenant.

(2) A landlord may consider credit references, rental history information and credit checks obtained pursuant to requests under subsection (1), alone or in any combination, in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly.

(3) A landlord may request income information from a prospective tenant only if the landlord also requests information listed in subsection (1).

(4) A landlord may consider income information about a prospective tenant in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly only if the landlord considers the income information together with all the other information that was obtained by the landlord pursuant to requests under subsection (1).

(5) If, after requesting the information listed in subsections (1) and (3), a landlord only obtains income information about a prospective tenant, the landlord may consider the income information alone in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly. O. Reg. 290/98, s. 1.

2.(1) A landlord may require a prospective tenant to obtain a guarantee for the rent.

(2) A landlord may require a prospective tenant to pay a security deposit in accordance with sections 117 and 118 of the *Tenant Protection Act, 1997*. O. Reg. 290/98, s. 2.

3. In selecting a prospective tenant, a landlord of a rental unit described in paragraph 1, 2 or 3 of subsection 5(1) or subsection 6(1) of the *Tenant Protection Act, 1997* may request and use income information about a prospective tenant in order to determine a prospective tenant's eligibility for rent in an amount geared-to-income and, when requesting and using the income information for that purpose only, the landlord is not bound by subsections 1(3) and (4). O. Reg. 290/98, s. 3.

4. Nothing in this Regulation authorizes a landlord to refuse accommodation to any person because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance. O. Reg. 290/98, s. 4; O. Reg. 31/00, s. 1.

PART III — INDEX

A

Accommodation

See also: Duty to accommodate

Barrier removal.....207-208

Board order..... 259

Costs — creed..... 25

Costs — disability..... 219, 222-224, 229-233

Costs — outside sources of funding..... 25, 219, 224-225

Costs — reserve fund..... 231-232

Design by inclusion..... 207

Disability..... 205-219

Excluded factors..... 219-221

Health and safety risk — creed..... 25

Health and safety risk — disability..... 225-229

Reserve fund — disability..... 231-232

Rights and duties..... 22-23, 215-218

Undue hardship.....24-25, 219-233

Voluntary assumption of risk..... 226-229

Awards

See: Scholarships and Awards

C

Canadian Citizenship

Scholarships and Awards.....175-176

Collective Agreements

Pregnancy..... 95-56

Sexual harassment..... 192-193

Constructive Discrimination

Code definition.....21, 42-43, 61, 77, 143

Drug and alcohol.....106-107

Gender identity..... 42-43

	Page
Constructive Discrimination — continued	
Height and weight.....	143
Language.....	77
Sexual orientation.....	61

Costs

Accommodation — creed.....	25
Accommodation — disability.....	219, 222-224, 229-233

Creed

Definition.....	19
Definition of Freedom of Religion.....	19-20
Definition of Religion.....	19
Discrimination.....	20-22
Discrimination — exceptions.....	31-32
Dress code.....	25-27
Duty to accommodate.....	22-24
Exclusions from definition.....	19
Harassment.....	20
Workplace — breaks.....	27
Workplace — flexible scheduling.....	30
Workplace — leaves.....	28-30
Workplace — recruitment.....	27-28

D

Disability

Accommodation.....	205-219
Accessibility review plan.....	234-235
Benefits — access and entitlement to.....	211, 223
Confidentiality.....	218-219
Costs.....	219, 222-224, 229-233
Definition.....	201-203
Dignity with risk.....	199
Discrimination.....	204-205
Duty to accommodate.....	205-219

	Page
Disability — continued	
Duty to accommodate — excluded factors.....	219-221
Employment — alternative work.....	212-214
Employment — essential duties.....	211-212
Full participation.....	206-208
Health and safety risk.....	225-229
Mental disability.....	203
Non-evident disability.....	202-203
Phasing in reserve fund.....	232
Respecting the dignity.....	205-206
Return to work.....	214-215
Social handicapping.....	202, 207
Undue hardship.....	219-233
 Discrimination	
Creed.....	20-22
Creed — exceptions.....	31-32
Female genital mutilation.....	126-127
Gender Identity.....	41-43
HIV/AIDS.....	149-150
HIV/AIDS — association.....	150
HIV/AIDS — remedies.....	153-154
Pregnancy.....	86-87
Scholarships and Awards.....	174
Sexual harassment — association.....	185
Sexual orientation.....	60-62
Special programs.....	244
 Driver's Licence	
Duty to accommodate.....	169-170
Record of offences.....	170
Requirement — essential or not.....	168-169
 Drug and Alcohol	
Constructive discrimination.....	106-107

	Page
Drug and Alcohol — continued	
Duty to accommodate.....	111-113
Employment — hiring.....	108-109
Handicap.....	105-106
Obligation — cooperation.....	111-112
Undue hardship.....	112

Duty to Accommodate

Creed.....	22-24
Creed — unions.....	23-24
Disability.....	205-219
Driving.....	169-170
Drug and alcohol.....	111-113
Height and weight.....	144
HIV/Aids.....	150-151
Medical information.....	119-120
Pregnancy.....	89-90

E

Employment

Alternative work.....	212-214
Drug and alcohol — hiring.....	108-109
Essential duties.....	211-212
Harassment — race.....	158
Harassment — gender identity.....	46-48
Harassment — sexual orientation.....	62-65
Medical information.....	118-119
Pregnancy — hiring, promotion, transfers, termination.....	87-88
Pregnancy — standards.....	96-97
Scholarships — benefits.....	176
Sexual harassment.....	184

F

Female Genital Mutilation

Clitoridectomy..... 124

Discrimination..... 126-127

Health rights..... 128

Infibulation..... 124

International law..... 125-126

Male circumcision..... 124-125

Policies: Commission, Ontario, Canada, International..... 122, 125-132

Rights of the child..... 127-128

Services, goods and facilities..... 134-135

G

Gender Identity

Confidentiality of information..... 48

Definition..... 40-41

Discrimination..... 41-43

Employment..... 44

Harassment..... 46-48

Housing..... 45

Services..... 44-45

H

Handicap

See also: Disability

Drug and alcohol dependency..... 105-106

HIV/AIDS..... 149

Harassment

Code definition..... 46, 62, 76, 150, 159, 182

Creed..... 20

Gender identity..... 46-48

HIV/AIDS..... 149-150

Pregnancy..... 93-94

Page

Harassment — continued

Race — association.....	162-163
Race — employment.....	158
Race — housing.....	159
Race — services, goods and facilities.....	159
Sexual orientation.....	62-65

Health and Safety Risk

Accommodation — disability.....	225-229
Creed.....	25

Height and Weight

Constructive discrimination.....	143
Duty to accommodate.....	205-219
Workplace — occupational requirements.....	143

HIV/AIDS

Discrimination.....	149-150
Discrimination — association.....	150
Discrimination — remedies.....	153-154
Duty to accommodate.....	150-151
Ensuring privacy.....	153
Handicap.....	149
Harassment.....	149-150
Respecting the dignity.....	151-152
Testing.....	152-153
Universal precautions.....	152-153

Housing

Gender identity.....	45
Pregnancy.....	94
Race.....	159
Sexual harassment.....	184
Sexual orientation.....	67
Tenant selection — credit checks and references.....	299

	Page
Housing — continued	
Tenant selection — income information.....	299-300
Tenant selection — rental history.....	299

I

Internal Policies

Advisor.....	255
Anti-discrimination policy.....	254
Board of inquiry.....	259
Complaint resolution procedure.....	255-256
Documentation.....	255
Education programmes.....	257
Employer responsibility.....	253
Investigators, role of.....	256
Protection from reprisal.....	255
Representation, right to.....	256
Role of Ontario Human Rights Commission.....	258-259

L

Language

Constructive discrimination.....	77
Poisoned environment.....	76-77
Workplace — occupational requirements.....	78

M

Medical Information

Duty to accommodate.....	119-120
Employment applications.....	118-119

P

Poisoned Environment

Gender identity.....	47-48
Language.....	76-77

Page

Poisoned Environment — continued

Pregnancy.....	93-94
Race.....	161-163
Sexual harassment.....	185-187
Sexual orientation.....	64-65

Pregnancy

Collective agreements.....	95-96
Definition.....	85-86
Discrimination.....	86-87
Duty to accommodate.....	89-90
<i>Employment Standards Act</i>	96-97
Employment — hiring, promotion, transfers, termination.....	87-88
Harassment.....	93-94
Housing.....	94
Poisoned environment.....	93-94
Services, goods and facilities — pregnancy.....	94-95
Workplace — absences.....	91-93
Workplace — benefit plans.....	90-91
Workplace — occupational requirements.....	88

R**Race**

Harassment — association.....	162-163
Harassment — employment.....	158
Harassment — housing.....	159
Harassment — services, goods and facilities.....	159
Poisoned environment.....	161-163

Religion

See: Creed

S

Scholarships and Awards

Canadian citizenship.....	175-176
Discrimination — exceptions.....	174-176
Employment benefit.....	176
Equality.....	172
Special interest organizations.....	176
Special programs.....	174

Search Warrants

Search and Entry Warrants (Regulation 642).....	296
---	-----

Services, Goods and Facilities

Female genital mutilation.....	134-135
Pregnancy.....	94-95
Race.....	159

Sexual Harassment

Code definition.....	182-183
Collective agreements.....	192-193
Company policies.....	192-193
Corporate liability.....	188-192
Discrimination — association.....	185
Employment.....	184
Housing.....	184
Obligations.....	190-191
Poisoned environment.....	185-187
Reprisal.....	185
Solicitation.....	184

Sexual Orientation

Benefits — access and entitlement to.....	56-58, 65-66
Confidentiality of information.....	67-68
Definition.....	60
Discrimination.....	60-62

Page**Sexual Orientation — continued**

Employment.....	65-67
Harassment.....	62-65
Housing.....	67
Services.....	66-67

Special Programs

Code definition.....	242
Data collection.....	246-247
Eligibility criteria.....	245-246
Monitoring.....	248
Plan.....	247-248
Scholarships and awards.....	174-175
Systemic discrimination.....	244
Workplace.....	192-193

U**Undue Hardship**

Accommodation.....	24-25
Disability.....	219-233
Drug and alcohol.....	112

W**Workplace**

Creed — breaks, flexible scheduling, leaves, recruitment.....	27-30
Employer liability.....	49, 68-69, 163-164
Employer responsibility.....	90, 253
Height and weight — occupational requirements.....	143
Language — occupational requirements.....	78
Pregnancy — absences, benefit plans, hiring, occupational requirements.....	88, 90-93
Sexual harassment.....	190-191

PART IV — OTHER OHRC PUBLICATIONS

OTHER OHRC PUBLICATIONS

Advertising Guidelines (08/99)

A Guide to Mediation Services (05/97)

Know Your Rights: Female Genital Mutilation and the Ontario Human Rights Code (Available in English/French, Arabic/Somali, Swahili/Amharic) (08/99)

Guide to the Human Rights Code (05/99)

Hiring? A Human Rights Guide (09/99)

Human Rights at Work (09/99)

Human Rights in Ontario: A Complainant's Guide (available in English/French, Hindi/Punjabi, Bengali/Urdu, Gujarati/Tamil) (07/00)

If You Have a Human Rights Complaint: A Complainant's Guide (05/97)

If You Receive a Human Rights Complaint: A Respondent's Guide (05/97)

Pregnancy — Before, During and After: Know Your Rights (05/99)

Protecting Religious Rights (01/00)

Racial Slurs, Harassment and Racial Jokes (06/96)

Sexual Harassment and Other Comments or Actions About a Person's Sex (11/96)

PART V — FOR FURTHER INFORMATION

FOR FURTHER INFORMATION

For more information about the Ontario Human Rights Commission or this policy statement, please call 1-800-387-9080 (toll free) or in Toronto (416) 326-9511 (TTY (416) 314-4535), during regular office hours from Monday to Friday. You can also visit our web site at www.ohrc.on.ca.

If a Human Rights Complaint is Made Against You

1. If the Commission receives a complaint against you, Commission staff will contact you to discuss the matter.
2. Commission staff will explain how the *Code* applies to the situation and how the complaint procedure works. Commission staff will work with you and the person making the complaint to try and resolve the concerns. The Commission also offers mediation services.
3. If the concerns cannot be resolved and mediation is not successful, the complaint may proceed to the investigation stage.
4. You can ask the Commission not to deal with the complaint under section 34 of the *Code* if:
 - (a) another Ontario law would be better suited to deal with the situation, such as the *Labour Relations Act*;
 - (b) you believe that the person making the complaint has no reasonable basis to support a claim of discrimination, or that the complaint is in bad faith, or that a remedy has already been obtained by the complainant somewhere else;
 - (c) the matter is outside the Commission's legal authority;
 - (d) the person making the complaint waited longer than 6 months from the last incident of discrimination to file a complaint.

5. The Commission is neutral and does not take sides in the complaint. Commission staff will assist you with questions about the complaint procedure. However, if you require legal representation or advice, please contact a lawyer.

If You Have a Human Rights Complaint

1. If you have a human rights complaint, you may contact the general inquiries line at 1-800-387-9080 or in Toronto at (416) 326-9511 from Monday to Friday during office hours. A Commission staff person will tell you if your concerns are covered by the *Ontario Human Rights Code* (the “Code”).
2. Commission staff will explain how the *Code* applies to your situation and how the complaint procedure works. Commission staff will work with you and the other party to resolve the concerns. The Commission also offers mediation services.
3. If you want the Commission to address your concerns, you should file a complaint within 6 months from the last incident of discrimination. This time limit is set out in section 34 of the *Code*.
4. “Filing a complaint” means that you have completed the Commission’s complaint form and provided all requested details. You must have signed, dated and returned the form to the Commission.
5. When you file a complaint, Commission staff will work with you and the person/company you have filed against, to try and resolve the complaint through mediation.
6. The Commission may consider not to deal with a complaint under section 34 if:
 - (a) another Ontario law would be better suited to deal with the situation, such as the *Labour Relations Act*;
 - (b) you have no reasonable basis to support a claim of discrimination, or that you have made the complaint in bad faith, or that you have already obtained a remedy somewhere else;
 - (c) the matter is outside the Commission’s legal authority;
 - (d) you have waited longer than 6 months from the last incident of discrimination to file a complaint.

7. The Commission is neutral and does not take sides in the complaint. Commission staff will assist you with questions about the complaint procedure. However, if you require legal advice, please contact a lawyer.

How to Reach Us at the Ontario Human Rights Commission

Tel: (416) 326-9511

Toll Free: 1-800-387-9080

TTY (Local): (416) 314-6526

TTY (Toll Free): 1-800-308-5561

Web Site: <http://www.ohrc.on.ca>

E-Mail: info@ohrc.on.ca

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